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No. 322

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

7415

NORFOLK & PORTSMOUTH BELT LINE RAILROAD COMPANY,
a Virginia corporation,
Appellant,

-vs-

BROTHERHOOD OF RAILROAD TRAINMEN, LODGE NO. 514, et al,
Appellees.

BRIEF AND APPENDIX OF APPELLEES

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BROTHERHOOD OF RAILROAD TRAINMEN, LODGE NO. 514, et al,
Appellees.

PROCEEDINGS IN THE LOWER COURT

The appellant carrier instituted this cause in the Circuit Court of the City of Norfolk on September 24, 1956, by filing a Bill of Complaint against the various employee organizations, hereafter referred to as Brotherhoods, and their local officers individually. The purpose of said Complaint was to enjoin said employees from engaging in a work stoppage scheduled for 7:00 o'clock A.M. on September 26, 1956, in protest against the Carrier's refusal to negotiate the hardships and working conditions occasioned to certain of the employees by the Carrier's announced plan to change the customary place of reporting and relief of crews from Port Norfolk in the City of Portsmouth, Virginia, to Berkley in the City of Norfolk, Virginia.

The Bill of Complaint was heard in the state court *ex parte* by the Honorable Lawrence V. Bullock, who was sitting during the vacation of the Honorable Clyde H. Jacob, the Judge of said Court. The first notice the Brotherhoods had of the filing of said Complaint or of said injunction was when the temporary injunction was served upon them.

On October 2, 1956, the several Brotherhoods who were properly served, removed the cause to the United States District Court for the Eastern District of Virginia, Norfolk Division, and all subsequent proceedings were heard by the Honorable Walter E. Hoffman, Judge of said Court. At the same time the Brotherhoods filed a Motion to Dismiss as to C. W. Mathews, as General Chairman of the Brotherhood of Locomotive Engineers, Lodge No. 331 on the ground that C. W. Mathews, though individually served, was not the General Chairman of Lodge No. 331. This Motion to Dismiss was unopposed by the Carrier and was, after the hearing, granted by the Court.

The sworn Answer of these appellees was filed on October 8, 1956, and the matter came on for full hearing on October 9, 1956.

On October 9, 1956, the Carrier filed a Motion to Strike Portions of the Appellees' Answer, which Motion was granted in part and overruled in part during the hearing.

On October 9, 1956, the Carrier was allowed to amend Paragraph 42 of its Bill of Complaint, which amendment constituted a complete reversal of the Carrier's position. In the State Court the injunction was granted on the Carrier's sworn allegation that the appellee organizations could not engage in a work stoppage *until* they first presented their

alleged "grievances" to the National Railroad Adjustment Board. But, as soon as the case was removed to the Federal Court and the Brotherhoods had filed their Answer, the Carrier amended its Complaint, and abandoned its contention that the appellees were obligated by the Railway Labor Act to prosecute their grievances to the Adjustment Board. In its Amended Complaint the Carrier asserted that the injunction should be granted in order that the Carrier could take the alleged "grievances" to the National Railroad Adjustment Board. The Brotherhoods filed an Amended Answer to the Amended Complaint on October 13, 1956.

On October 23, 1956, the Carrier amended Paragraph 35 of its Bill of Complaint and on October 23, 1956, appellee filed an Amended Answer to Paragraph 35.

The evidence in this cause was heard ore tenus on October 9th, 15th and 23rd and was argued by counsel on October 15th and 23rd. Thereafter it was fully briefed by counsel and taken under advisement by the Court.

On December 20, 1956, the Carrier moved for, and the District Judge granted an extension of the state court's ninety (90) day injunction until further order of the Court, and increased the injunction bond from Two Thousand Dollars ($2,000.00), as fixed by the state court, to Ten Thousand Dollars ($10,000.00).

On January 25, 1957, the District Judge filed his opinion, containing the Court's findings of fact and conclusions of law, in which opinion the Court concluded the injunction should be dissolved.

On February 8, 1957, the Court entered its final order on the merits dissolving the temporary injunction and dis-

missing the cause from the docket. On the same day the Carrier filed its Notice of Appeal and moved for, and the Court granted, an injunction pending the appeal.

FACTS

In as much as the Chancellor has written a complete opinion setting forth his findings of fact and conclusions of law, no detailed restatement of the facts is required. If the appellate court is interested in a detailed factual account, its attention is invited to the Chancellor's opinion.

A summary of the general factual background is offered herewith in order to correct certain misconceptions contained in the appellants' brief.

The operative facts are these: From 1898 until 1956, employees of the Norfolk-Portsmouth Belt Line Railroad reported to work on the Portsmouth side of the Elizabeth River at Port Norfolk, which is located in the City of Portsmouth, Virginia. There existed between the parties a well established custom that whenever men were required to work at any other point than Port Norfolk, they would first report to Port Norfolk and then be transported from Port Norfolk to the particular point where work was to commence on the Carrier's time and in Carrier furnished vehicles.

In the Fall of 1955, the Carrier decided to change the place of reporting and relief for some five or six crews (25-30 men) from Port Norfolk to Berkley, in the City of Norfolk, Virginia. This decision was not communicated to the Brotherhoods by the Carrier, but became obvious when the Carrier commenced the construction, at Berkley, of employee locker rooms and shower facilities as required

by existing collective bargaining contracts between the Carrier and the Brotherhoods.

On November 25, 1955, the Brotherhoods wrote the Carrier's president asking for a conference to discuss the change in working conditions that would be occasioned by the proposed change of reporting and relief points. The Brotherhoods' letter was ignored by the Carrier from November 25, 1955 until February 10, 1956, when a conference was held in the Carrier president's office. Present at that conference were the Carrier's president and general manager and the Brotherhoods' general chairmen. Without detailing the events of that conference the Chancellor has found that the Carrier refused to negotiate an agreement with the organizations to cover the hardships and working conditions that would result from the change in reporting point from Port Norfolk to Berkley. The evidence is also clear that the organizations told the Carrier at that conference that they did not object to the change of reporting point from Port Norfolk to Berkley, but that they did object to being required to go to Berkley without having an agreement covering hardships and working conditions which would result from the change of reporting and relief point.

When the Carrier refused on February 10, 1956, to negotiate an agreement covering hardships and working conditions that would result from the proposed change, the Brotherhoods, on February 13, 1956, sought the aid of the National Mediation Board. The Board, by letter of March 5, 1956, declined jurisdiction as the Carrier had not, at that time, formally posted notice of the change, so that an actual dispute did not exist.

On April 26, 1956, however, the Carrier did formally post notice of the change, effective May 2, 1956. Simultaneously, the Brotherhoods served notice on the Carrier that it would strike on May 2, 1956, in protest against the Carrier's refusal to negotiate, as required by the Railway Labor Act, an agreement to cover the proposed change in working conditions.

On April 26, 1956, the Brotherhoods again notified the National Mediation Board of the impending strike and sought its assistance. On this occasion the Mediation Board promptly intervened and proffered its services. A mediator was sent to Norfolk by the Board on May 2, 1956. Initial mediation commenced but was continued on motion of the Carrier. (See Carrier's letter of May 2, 1956, Defendants' Exhibit No. 3). The parties resumed mediation late in May, 1956, and continued until all hope of settlement by mediation was exhausted.

The mediation concerned two points only: "continuous time" (wages) and "transportation expenses."

When mediation failed on the local level, the parties were directed to appear in Washington on July 23, 1956, to make a final effort to reach a settlement under the guidance of a member of the Mediation Board. The parties met on July 23rd and discussed the matter all day. Toward the end of the day a proposal for settlement was made by the Mediator. The proposal was signed by the Mediator and the Brotherhoods, but was subsequently rejected by the Carrier. The Chancellor refused to admit this proposal as evidence of the items in dispute between the parties, and same is marked "Defendants Exhibit 4, Refused."

On August 16, 1956, after the Carrier had rejected the aforementioned final proposal of settlement, the National Mediation Board notified the parties it was terminating its services and closing its file on the case. After waiting thirty days, the Carrier, on September 21, 1956, posted notice of its intention to change the reporting point for five crews, effective at 7:00 o'clock A.M., September 26, 1956.

On September 24, 1956, the Brotherhoods notified the Carrier of their intent to strike at 7:00 o'clock A.M., September 26, 1956, as there was no agreement as to wages and transportation expenses in effect for the proposed reporting and relief point.

On September 25, 1956, the Carrier, without notice, and while the regular Judge was on vacation, sought and obtained *ex parte* an injunction in the Circuit Court of the City of Norfolk against the proposed strike.

The effect of the injunction was not only to prevent the strike, but also to require the men to report at the new reporting point against their will and without any agreement as to compensation or travel expense. The injunction, while "preventive" as to strike, was "mandatory" in requiring the men to work without an agreement as to "continuous time" and "transportation expense."

THE DECISION OF THE CHANCELLOR

The District Judge sitting as a Chancellor has resolved the issues between the parties in favor of the appellees. The controlling issue between the parties is whether or not their dispute is a "major" or a "minor" dispute within the meaning of the Railway Labor Act. The Chancellor found and the evidence clearly shows that the dispute involved was

the negotiation of an agreement for "continuous time" and "transportation expense," and that such was a "major" dispute.

The Chancellor further found that all preliminary procedures required by the Railway Labor Act had been complied with by the appellees before a strike date was set, and, therefore, the appellees had a legal right to strike on September 26, 1956 when the State Court injunction was issued.

If this Court accepts the facts as found by the Chancellor, as it must if supported by the evidence, then no other legal conclusion can be reached than that reached by the District Judge. The only issue that can be raised on appeal is whether or not the record supports the factual finding of the Chancellor. In that regard, the appellees submit that the determination of the District is clearly right.

Point I: The Dispute Between the Parties is "Negotiable."

Determining what the dispute was between the parties is a factual matter and can be resolved only by the evidence. The sole evidence in the record as to what the dispute was appears in the testimony of Mr. Hayes, the principal witness called by the Brotherhoods. The first and only conference the Brotherhoods had with the Carrier's president was held in the president's office on February 10, 1956. Witness Hayes gave this account on the dispute raised at that conference: (See Appendix p. 2)

> "Q. When you met at that time what, if anything, did Mr. White have to say about the proposed change from Port Norfolk to Berkley?

A. Well, Mr. White told us at the outset of this conference that it wasn't called for the purpose of negotiating an agreement to cover this change in working conditions; that it was his position that under the contract rules then existing that he was privileged to make this change.

Q. Did he offer at that time to negotiate a new agreement for working conditions?

A. No, sir.

Q. Occasioned by the change?

A. No, sir. He told us frankly that that wasn't the purpose of the conference.

Q. Did you state to him on that occasion what your complaints were?

A. Yes, sir.

Q. And what, if anything, did you tell him?

A. That our complaints was the hardships, namely, the one hour travel time in each direction each day, and the expense involved, which at that time was 80 cents on public transportation.

Q. Is that one way or round-trip?

A. I understood that to be per day.

Q. Round-trip?

A. That would be round-trip."

The Carrier has argued that the dispute between the parties was that the Brotherhoods denied the Carrier's right to change the point of reporting and relief from Port Nor-

folk to Berkley unless the Brotherhoods consented or agreed to the change. But the evidence does not support that contention. In this regard, see the Appendix page 3, where Mr. Hayes testified:

"Q. Did you or any of you representing the defendants at that time voice any opposition to the change from Port Norfolk to Berkley?

A. As best I remember, I told Mr. White at that time that we wanted the railroad to be able to utilize this Diesel power that they anticipated purchasing, or had already contracted to purchase, to the fullest extent, and that we had no objections to them having the men work anywhere on the property; that our complaint was the hardship imposed on our men by the change, and we felt some agreement should be worked out to cover it.

Q. Did Mr. White at that time give you any indication as to when the change might go into effect?

A. No, sir. He said that it might be the next week or the following week; any time, a short while after this conference.

Q. Was there any suggestion that negotiations regarding this change in working conditions would be entered into before the change has to be made?

A. No, sir. He told us very definitely that he wouldn't entertain any conference for that purpose.

Q. What then did you do after the conference of February 10th, 1956, with Mr. White?

A. We immediately requested the Mediation Board to invoke its services."

In discussing what the Brotherhoods negotiated with the Carrier during mediation, Mr. Hayes said; (Appendix p. 8):

"Q. What did you then negotiate with the complainant and the defendant? I am not asking you details or terms. What were the items in dispute?

A. The travel time from Port Norfolk to Berkley and the expenses, transportation expense."

Mr. Hayes also testified that the Brotherhoods never negotiated with the Carrier its right to make the change. (Appendix p. 19, 20)

"Q. (By Mr. MacMillan) Mr. Hayes, did you at any time negotiate with the complaint over his right to move the place of reporting and relief from Port Norfolk to Berkley?

A. No, sir, not as such. We were trying to get Mr. White to negotiate an agreement to cover the hardships and expense imposed on the men by this change.

Q. Did you ever deny that the carrier had the right to make this change?

A. No, sir; they have that right. That is the prerogative of the management.

Q. Why did the defendants schedule the strike which was called on both May 2nd, 1956, and September 26, 1956, for the same hour which the carrier had scheduled the move from Port Norfolk to Berkley?

A. Well, that was the date and time that these hardships would have been imposed by this change on the men and an agreement had not been worked out to take care of this one hour travel time in each direction

and this expense involved which we considered hardship."

Even the Carrier acknowledged that the dispute involved the hardships resulting from the change. See page 21 of the Appendix where Carrier's counsel asked this question of Mr. Hayes on cross-examination:

Q (By Mr. Wilcox) Mr. Hayes, there isn't any doubt in the world about the fact that this controversy centers around the men's claim that they are entitled to time and expense for travel from Port Norfolk to Berkley?

A. I don't know that I understand your question, Mr. Willsox.

Q. Let me make it a little plainer so you can.

THE COURT: You are talking about this controversy right now?

MR. WILLCOX: The controversy between the Brotherhoods and the railroad company which led to this situation.

Q. I think you have testified to it but I just want to get it straight. You admit that is a prerogative of management, the railroad company has a right to use Berkley Yard as a starting point and stopping point of trains?

A. They have that right.

Q. And you contend and the Brotherhoods contend that as a condition precedent to exercising that right they must negotiate an agreement with the Brotherhoods pro-

viding for what you call the hardships, that is, the time consumed and the expense; that is correct, isn't it?

A. I didn't say that that was absolutely necessary. I don't think, Mr. Willcox, I said that was our purpose in trying to negotiate an agreement to cover those hardships. That is what we were protesting, the fact that it hadn't been done.

Q. Those hardships have been the subject of the negotiations, haven't they?

A. They have, yes, sir."

The several quotes hereinabove set out are the sole testimony in the transcript as to the dispute between the parties. On that state of the evidence, the trial court was justified in finding that the dispute involved the negotiation of an agreement to cover the changed working conditions (travel time and transportation expense) that would be occasioned by the change of the reporting and relief point from Port Norfolk to Berkley.

The Chancellor ably pointed out in its Memorandum of Opinion at page 13 that "there would be no occasion to negotiate the issues of continuous time and transportation expense unless defendants conceded that the Carrier had the inherent right to make the change" of reporting point. As a prerequisite to negotiating hardships the Brotherhoods concede the Carrier had the absolute pov .: and inherent right to change the reporting point from Port Norfolk to Berkley without the consent or agreement of the Brotherhoods.

In their sworn Answer to the Complaint filed, in their opening statement, in the testimony of their officers given

in this cause, in their closing argument, in the briefs filed in the Lower Court, and now in this appellate brief, the Brotherhoods admit, concede and acknowledge that the Carrier, in the exercise of its managerial prerogative, and without regard to the wishes of the Brotherhoods, has the inherent right as management to change the designated point of reporting and relief. Under this state of the facts, the sole dispute involved is negotiating an agreement to adjust the hardship occasioned by the change of the reporting and relief point.

This evidence shows clearly why the case of *New York Central Railroad Company vs Brotherhood of Railroad Trainmen*, D. C. Ohio, 140 F Supp. 273, decided May 1, 1956, has no bearing on the issue in this case. In the *New York Central* case the court found as a factual matter that the strike there involved was called to protest the change of location of a station without the consent of the Brotherhoods. There the right of the Carrier to make the change was denied. The Carrier there offered to negotiate the hardships occasioned by the change, but the employees denied the Carrier's right to make the change at all. Here the dispute involves the making of an agreement to cover the change of working conditions caused by the change of reporting and relief point. The District Judge properly found the *New York Central* case was not applicable to the dispute in this cause.

The hardships resulting from the change here contemplated are very real. The practical effect of the change is that employees who have established homes in Port Norfolk, the customary reporting point for 58 years, must spend an additional 2½ hours a day traveling on public conveyance

to and from work, plus an additional transportation expense of 80 cents a day for bus and tunnel fare. (Appendix p. 3) The effect of the state court injunction was to force the individual employees affected to work this extra time and incur this extra expense against their wills. (Appendix p. 35 and 41). This condition has continued since September 25, 1956, when the state court injunction was entered and still continues during this appeal. Forcing railroad employees to work without compensation and thus, against their wills is in violation of Section 2, Tenth of the Railway Labor Act (45 USCA, Section 152, Tenth), which provides:

> "****Provided, That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent."

Where a carrier proposes to change the working conditions of the employees to such an extent that the established practice of transporting men on company time is to be changed, the carrier is required to negotiate such change in working conditions with the employees. Such is the clear requirement of Section 2, Seventh of the Railway Labor Act (Title 45, USCA, Section 152, Seventh) which provides:

> "No carrier, its officers, or agents shall change the rates of pay, rules or working conditions of its employees, as a class, as embodied in agreement except in the manner prescribed in such agreements or in Section 6 (Title 45, USCA, Section 156) of this Act."

Section 6 of the Railway Labor Act (Title 45, USCA, Section 156) provides:

> "Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

The carrier cannot change working conditions and established customs so as to require the employees to work 2½ hours more a day and to spend 84 cents money per day in transportation without being required to negotiate such changed working conditions. The Carrier refused to negotiate the proposed change in working conditions on February 10, 1956. Later, negotiations were held during the mediation, but failed.

In its brief, the Carrier asserts that the Opinion of the Court is not supported by the evidence. This is a grave charge and must be dealt with specifically.

At page 19 of its brief, the Carrier says there is no evidence to support the Court's finding that the sole dispute negotiated during mediation was "continuous time" and "travel expense." It is true the Court, on the objection of the Carrier, refused to hear or admit in evidence the terms of offers of settlement and compromise that passed back and forth between the parties during mediation: That is, the number of hours travel time and transportatic . expense to be allowed. In this regard, the Court even rejected Defendants' Exhibit No. 4 which was the final proposal of settlement that was considered by the parties and approved by the Mediation Board. But the Court did admit much of what occurred during mediation. The Court specifically allowed the parties to testify as to what dispute was negotiated during mediation. See Appendix p. 8.

> Q. What did you then (during mediation) negotiate with the complainant and the defendant. I am not asking you for details or terms. What were the items in dispute?
>
> A. The travel time from Port Norfolk to Berkley and the expenses, transportation expenses."

This testimony was not contradicted. No witnesses for the Carrier testified that the parties ever negotiated the question of the Carrier's right to make the change. On the contrary, the evidence shows that the Carrier's right to make the change was never denied. See Appendix p. 19:

> "Q. (By Mr. MacMillan) Mr. Hayes, did you at any time negotiate with the complainant over his right to move the place of reporting and relief from Port Norfolk to Berkley?

A. No, sir, not as such. We were trying to get Mr. White to negotiate an agreement to cover the hardships and expense imposed on the men by this change.

Q. Did you ever deny that the carrier had the right to make this change?

A. No, sir; they have that right. That is the prerogative of the management."

The Carrier has tried vainly to read into the Brotherhoods' letters of November 25, 1955 and February 13, 1956, a denial of the Carrier's right to make the change. All that those letters say is if the Carrier makes a change in the designated reporting and relief point, the Carrier cannot refuse to negotiate an agreement to cover the change in working conditions or hardships, occasioned by the change of reporting point. Such negotiation is specifically required by the Railway Labor Act (Title 46, USCA, Section 152, Seventh).

The Carrier also attacks the lower court opinion at page 24 of his brief. He says:

> "In this case, there is absolutely not a word of evidence in the correspondence, the telegram, the pleadings or the testimony that the defendants have ever asked for or demanded any additional compensation."

The Carrier must not be familiar with the record or such a representation could not be made to the Court. The parties first met on February 10, 1956 in the Carrier President's office to discuss this dispute. At this very first meeting the Brotherhoods communicated their demands to the Carrier's President who refused to negotiate the demand with them. See testimony of Hayes, Appendix p. 3:

"Q. Did he (carrier's president) offer at that time to negotiate a new agreement for working conditions?

A. No, sir.

Q. Occasioned by the change?

A. No, sir. He told us frankly that wasn't the purpose of the conference.

Q. Did you state to him on that occasion what your complaints were?

A. Yes, sir.

Q. And what, if anything, did you tell him?

A. That our complaints was the hardships, namely, the one hour travel time in each direction each day, and the expense involved, what at that time was 80c on public transportation.

Q. Is that one way or round trip?

A. I understand that to be per day.

Q. Round trip?

A. That would be round trip.

Q. Did you or any of you representing the defendants at that time voice any opposition to the change from Port Norfolk to Berkley?

A. As best I remember, I told Mr. White at that time that we wanted the railroad to be able to utilize this Diesel power that they anticipated purchasing, or had already contracted to purchase, to the fullest extent, and that we had no objections to them having the men work anywhere on the property; that our com-

plaint was the hardship imposed on our men by the change, and we felt some agreement should be worked out to cover it."

This evidence was uncontradicted. Thus, the record is clear and unequivocal that at their first conference, two months before mediation began, the Brotherhoods admitted the Carrier's right to make the change and were demanding compensation of one hour's travel time and 80c allowance for transportation expense. But, the Carrier refused to negotiate these wage and transportation expenses demands until forced to do so by the National Mediation Board.

No one present at the trial or familiar with the transcript of the record could deny that the findings of the trial court are not only supported by the record, but are actually based on uncontradicted evidence.

Point II: This Dispute Does Not Involve the Interpretation of a Contract or Rule so as to be within the Jurisdiction of the National Railroad Adjustment Board.

As indicated in Point I, the dispute between the parties as shown by the evidence and as found by the Chancellor is one involving the negotiation of an agreement concerning the change of working conditions occasioned by the change of reporting and relief point from Port Norfolk to Berkley.

The only provision in the several labor agreements involved even relating to change of reporting point is as follows:

"(a) Yard crews shall have a designated point for

going on duty and a designated point for going off duty.

"(b) The point or going on and off duty will be governed by local conditions. In certain localities instructions will provide that yardmen will report at the hump, others report at yard office, others at engine houses or ready tracks. It is not considered that the place to report will be confined to any definite number of feet, but the designation will be to indicate a definite and recognized location."

The Carrier contends the above rule makes it unnecessary for it to negotiate a change of working conditions with the Brotherhoods.

The above rule, with unimportant differences, appears in all labor contracts of all railroad employees in the United States. This uniformity results from the fact that such rule was originally promulgated during World War I when the Federal Government set up a Committee of Eight to regulate the several railroads (including this Carrier). The above rule was promulgated as Article XVIII in Supplement No. 15, General Order 27 of said regulating body.

Prior to the promulgation of this rule, management could require an employee to report for work at one point (frequently far removed from his abode) and relieve him at another point (frequently far removed from his abode and lacking transportation facilities), and change his reporting and relief point daily. To correct this hardship, subparagraph (a) of the above rule was promulgated; *not*, however, to give the carriers a right to designate the point of reporting and relief (as they had always had that right as the inherent prerogative of management), but, rather, to control the unfair exercise of that right by requiring the Carrier to designate a definite point of reporting and relief.

In short, the rule was enacted to protect the employees by requiring the Carrier to designate a definite reporting and relief point. See Award No. 12,664 of the National Railroad Adjustment Board where the Board said:

> "The rule in question is negotiated for the protection of the employee."

The rule does not add to the Carrier's managerial power as this Carrier contends. The Carrier already had the absolute power to designate the reporting and relief point before the rule was promulgated. The rule limits the Carrier's absolute power of designation by providing that a point must be designated and adhered to with reasonable regularity.

Subparagraph (b) of the rule merely provides that in designating the point, local conditions shall determine what point is selected, giving examples of customary points.

The history, intent, meaning and application of this contract rule has been repeatedly construed by the National Railroad Adjustment Board. Without exception the Adjustment Board has given the meaning and interpretation asserted by these Brotherhoods. For these decisions of the National Railroad Adjustment Board, see Award Nos. 12,664; 10,603; 12,035; 14,941. The only objection the Carrier voices to these decisions is that in each of the decisions the Adjustment Board made a finding that it had jurisdiction of the parties. It will be noted that the allegation of jurisdiction in the decisions relate to the finding that the carrier party and the brotherhood are employer and employees within the meaning of the Railway Labor Act. That finding gave the Adjustment Board sufficient jurisdiction of the parties to consider whether or not the dispute was one over which the Board had jurisdiction. In each case the Board

found it had jurisdiction of the parties but not of the dispute because it was a negotiable matter which the parties could only decide by agreement.

The Carrier has contended that these Brotherhoods should file time claims with the Carrier and then upon rejection of their claims by the Carrier, they should present their claims to the Adjustment Board for an allowance of such time and transportation expense as has resulted from the change from Port Norfolk to Berkley. Appendix p. 30. The Carrier say Rule 18 will support such claims. This is not a novel suggestion and time claims have been processed to the Adjustment Board on numerous occasions.

On each such occasion, however, the Adjustment Board has refused to take jurisdiction of such time claims filed under this rule on the ground that *the Adjustment Board's sole duty is to interpret existing agreements, not to make agreements for the parties where they cannot agree.* The Board has uniformally held time claims based on hardships resulting from the change of reporting and relief point is a negotiable matter; that is, a matter that can be settled only by negotiation and agreement between the parties themselves; no such agreement can be imposed on the parties by the Adjustment Board. Thus, the Carrier party in Award No. 12,035 resisted time claims filed by their employees under this rule as follows:

"POSITION OF CARRIER:
JURISDICTION QUESTIONED

The claim here involved amounts to nothing less than a demand for a change in the agreement between the Carrier and the Brotherhood representatives. The

agreements hereinafter quoted make it clear that the Carrier has the undoubted authority to determine the starting point and the relieving point; it is left to the discretion of the Management. No provision of the agreements has been violated. The demand, in effect, is to supply transportation, which is equivalent to demanding added pay, expended in the form of a transportation charge.

Therefore, the question involved is one for negotiation between the parties, which would ultimately be referable to the Mediation Board, and consequently it is most respectfully represented that the Adjustment Board has no jurisdiction over the question involved, and it is requested that jurisdiction be denied."

The Adjustment Board adopted the carrier's view and dismissed the employees' request as follows:

"The request as submitted appears to be one for negotiations. Award: Request dismissed."

To the same effect, see Award 10,603.

In every case that has gone before the Adjustment Board based on Rule 18, the carrier party has contended Rule 18 merely required the carrier to designate a reporting and relief point. The carrier party has always contended any hardship or altered working condition occasioned by the change of point is a matter to be negotiated and contracted for between the parties and the Adjustment Board had no jurisdiction of the matter.

Thus, the numerous decided opinions of the Adjustment Board in identical cases are added support to the trial court's determination that Rule 18 cited by the Carrier was not involved in this dispute and, therefore, the dispute be-

tween the parties was a negotiable dispute and not within the jurisdiction of the Adjustment Board.

In *Elgin, Joliet & Eastern Railway Company vs Burley, et al*, 325 US 711, 25 S. Ct. 1282 (1944), the Supreme Court draws the distinction between disputes concerning the *making* of new agreements covering rates of pay, rules or working conditions which are termed "major disputes," and disputes growing out of "grievances" or out of the interpretation or application of *existing* agreements which are designated "minor disputes." Only the latter disputes are within the jurisdiction of the National Railroad Adjustment Board.

The Court drew this distinction as follows (page 722):

"The difference between disputes over grievances and disputes concerning the making of collective agreements is traditional in railway labor affairs. *******

"The statute first marks the distinction in Section 2, which states as among the Act's five general purposes: "(4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." The two sorts of dispute are sharply distinguished, though there are points of common treatment. Nevertheless, it is clear from the Act itself, from the history of railway labor disputes and from the legislative history of the various statutes which have dealt with them, that Congress has drawn major lines of difference between the two classes of controversy.

"The first relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the

issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have *vested* in the *past*.

"The second class, however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreemnt, e. g., claims on account of *personal injuries*. In either case the claim is to rights accrued, not merely to have new ones created for the future.

"In general the difference is between what are regarded traditionally as the major and the minor disputes of the railway labor world. * * * * * * * (Underscoring added)

In its brief appellant argues that the action of the District Judge is inconsistent with the recent decision reached by the Supreme Court in the case of *Brotherhood of Railroad Trainmen, et al vs Chicago River & Indiana Railroad Company, et al*, decided March 27, 1957, US

That case has no bearing on the issues in this cause.

The *Chicago River* case involved 21 contract "*grievances*" the employees had with the carrier, which grievances grew out of the interpretation and application of existing collective bargaining agreements. *All parties admitted that the dispute in that case was a "minor" dispute according to the test laid down in the Burley case, supra, and a dispute*

within the jurisdiction of the National Railroad Adjustment Board. The holding of the *Chicago River* case is that the Railway Labor Act deprives the employees of their right to strike over "minor" disputes while such dispute is pending before the National Railroad Adjustment Board. The decision makes it clear that the Railway Labor Act has not deprived the employees of the right to strike in cases of "major" disputes where negotiations, under the auspices of the National Mediation Board, fail. The pertinent portion of the decision states (page ....):

> "The grievances for which redress is sought by the Brotherhood are admittedly "minor disputes" as that phrase is known in the parlance of the Railway Labor Act. These are controversies over the meaning of an existing collective bargaining agreement in a particular fact situation, generally involving only one employee. Section 2. Sixth. They may be contrasted with "major disputes" which result when there is disagreement in the bargaining process for a new contract. Section 2. Seventh. See *Elgin, J. & E. R. Co. v. Burley*, 325 U. S. 711, 722-724.

The lack of merit in the Carrier's position on appeal can be seen by its contention that the filling of an application with the Adjustment Board seeking a determination of an alleged dispute over the interpretation of an existing agreement is grounds for an injunction. That would be true if the dispute involved the interpretation of an existing contract. The trial judge has found by the uncontradicted evidence that the sole dispute between the parties was a "major dispute;" that is, a dispute involving the negotiation of an agreement to cover new working conditions resulting from the change of the reporting and relief point.

The Carrier's application to the Adjustment Board is

a sham, and a device to attempt to confuse the "clear cut" record before this Court. The state court injunction was obtained on the Carrier's sworn statement that the Brotherhoods could not strike until they (the Brotherhoods) went to the Adjustment Board. The state court injunction was granted ex parte. As soon as the cause was removed to the Federal Court, the Carrier changed its position entirely and amended its sworn pleadings, asking the Federal Court to make the injunction permanent while the Carrier took the alleged contract dispute to the Adjustment Board. Months elapsed before any submission was made to the Adjustment Board; and then only after the trial in the lower court was concluded and all of the evidence was against the Carrier.

The trial court refused to permit the Carrier to file in evidence the submission to the Adjustment Board (proffered long after the trial was concluded) on the ground it was irrelevant. No objection or exception was, or has been taken or raised to the court's action. The submission is irrelevant because the facts at trial showed conclusively that the dispute was one involving the negotiation of a new agreement. The Adjustment Board has no jurisdiction of said dispute.

The weakness of the Carrier's brief is that it cites good law, but the law is not applicable to the uncontradicted facts as developed at the trial. Had the trial court found the dispute was a "minor dispute" then that factual finding would have brought the case within the law urged by the Carrier. But, the Court having found that the dispute was a "major dispute," then the cases dealing with "minor disputes" have no applicability.

It is clear from the foregoing that this dispute is a "major dispute" over which the Adjustment Board has no

urisdiction. This cause involves a dispute that can only be ettled by negotiation and agreement between the parties. The Adjustment Board cannot make an agreement for the parties in this cause.

POINT III: The Appellees, having complied with the Procedural Requirements of the Railway Labor Act, had the Right to Strike when Enjoined by the State Court.

CONCLUSION

In Point I, the Brotherhoods have shown from the evidence that this dispute is negotiable and, therefore, is a "major dispute." In Point II the Brotherhoods have established that the Adjustment Board has jurisdiction of "minor" disputes only, so had no jurisdiction of this dispute.

The remaining question, therefore, is whether or not the Brotherhoods have complied with the procedural requirements of the Railway Labor Act so that they are now free to strike. The Chancellor found that the Brotherhoods had complied with the Act. The evidence conclusively supports the Chancellor's finding on this point.

The evidence shows that the Brotherhoods first notified the Carrier of their dispute on November 25, 1955. That on February 10, 1956 all parties met in the office of the President of the Carrier, at which time the Brotherhoods were told the Carrier would not negotiate with them this question of hardships (although required to do so by the Railway Labor Act).

Both on February 13, 1956 and again on April 26, 1956, when all hope of negotiation with the Carrier had

terminated, the Brotherhoods sought the assistance of the National Mediation Board, whose services were proffered on May 2, 1956. Thereafter, the parties exhausted mediation on the local level and before a Board Member in Washington on July 23, 1956.

In due course, arbitration was offered and rejected, and on September 16, 1956, the Mediation Board released the parties and closed its files. This releasing of the parties by the Mediation Board constituted acknowledgement that all procedural requirements of the Railway Labor Act had been complied with by the parties and that they were free to use self-help, which included the right to strike.

In the *Elgin* case, *supra*, the Supreme Court outlined the procedural requirements governing major disputes at page 725:

> "Beyond the initial stages of negotiation and conference however, the procedures diverge. "Major disputes" go first to mediation under the auspices of the National Mediation Board; if that fails, then to acceptance or rejection of arbitration, cf. Section 7; *Trainmen v. Toledo, P. & W. R. Co.*, 321 U.S. 50; and finally to possible presidential intervention to secure adjustment. Section 10. For their settlement the statutory scheme retains throughout the traditional voluntary processes of negotiation, mediation, voluntary arbitration and conciliation. Every facility for bringing about agreement is provided and pressures for mobilizing public opinion are applied. *The parties are required to submit to the successive procedures designed to induce agreement. Section 5 First (b). But compulsions go only to insure that those procedures are exhausted before resort can be had to self-help. No authority is empowered to decide the dispute and no such power is intented, un-*

less the parties themselves agree to arbitration."
(Underscoring provided)

All of these requirements have been complied with.

In desperation the Carrier contended in the District Court and at page 25 of its brief, that the Brotherhoods had failed to give the Carrier the notice provided for in section 6 of the Railway Labor Act (Title 45 USCA, Section 156), which is set out above at page 16.

Without discussing whose duty it was to give the notice, or if it was the Brotherhoods' duty, whether or not the letters of November 25, 1955, February 10, 1956, and February 13, 1956, constituted due notice, the question raised by the record in this case is whether or not the Carrier waived formal notice by negotiating the dispute of hardships with the Brotherhoods under the auspices of the Mediation Board. The Carrier admittedly mediated this dispute with the Brotherhoods for four days in Norfolk and one day in Washington. The sole issues mediated were "continuous time" and "transportation expenses."

The Brotherhoods submit that the Carrier cannot negotiate a dispute for five days and then when agreement cannot be reached, contend that it did not receive formal notice of said dispute. If a defendant appears on the trial day without formal notice, and the cause is tried and judgment goes against him, he cannot contend he had not been formally served with notice. The Carrier's contention is not novel. The same contention was made without success in *McMullans vs. Kansas, Oklahoma & Gulf Railway Company*, 10 Cir., 229 F (2d) 50, certiorari denied, 351 US 918.

Beginning at page 26 of its brief, the Carrier asserts the Brotherhoods had not taken all the steps required of them

by the Railway Labor Act. As indicated above, the only steps required to be taken by the Brotherhoods was to negotiate with the Carrier separately or under the auspices of the National Mediation Board, and to maintain a status quo until released by the Mediation Board. The Carrier stipulated at trial that the issue was negotiated during mediation. (Appellants App. p. 17.)

All other procedures for settlement were voluntary or permissive and whether or not they were done is immaterial. These Brotherhoods had complied with the Railway Labor Act when they did those acts required of them. When the National Mediation Board released the parties, they were free to seek self-help. The Court will recall that the Mediation Board did not release the parties until after the Carrier had rejected the final proposal of settlement which was agreed to by the Brotherhoods and approved by the Mediator. The Carrier admitted that the Mediator suggested arbitration to both sides. See Appendix p. 47 where Carrier's President said:

> "A. Judge, as Mr. Willcox has brought out, the mediator, during the five-day session in Norfolk and the time that we were in Washington and on other occasions, had suggested *all the possible means of settling the dispute.* But we did not receive a direct offer from the other side to arbitrate. We did not make a direct offer to arbitrate. *It was just one of the suggestions that were made I suppose to both sides by the mediator.* We have not received any offer to arbitrate from the organizations nor have we made any."

The Carrier, at page 28 of its brief, in discussing the

fact that the Carrier admittedly never offered to arbitrate the dispute said:

> "Apparently the Court was of the opinion that such failure was fatal to the Belt Line's case."

Actually, the Court merely stated that the Carrier's failure to exhaust the remedy of arbitration before seeking an injunction, might be a prerequisite to the granting of an injunction. *Trainmen v. Toledo P. & W. R. Co.*, 321 US 50, 64 S. Ct. 413, 88 L. Ed. 534. Of course, the evidence is clear that the Mediator discussed arbitration with both parties (Appellant's app. p. 18; p. 26) but it was unfruitful, as neither party was willing to submit to arbitration. What more can the Mediation Board do if the parties do not wish to submit to arbitration. So much for the Carrier's objection as to Section 5. First (45 USCA Section 155. Firts).

The Carrier's other objection is that the Mediation Board did not notify the President of the United States of this dispute in order that the President could appoint a board to investigate and report respecting such dispute. Title 45, USCA, Section 160 specifically vest in the Mediation Board the discretionary power to determine whether or not the disputes "threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service." The Mediation Board is not required in every case to notify the President; by its letter releasing the parties it is clear the Mediation Board felt it could be of no further service and released the parties from its jurisdiction.

It is obvious from the above that the Carrier seeks to hold these Brotherhoods responsible because the National Mediation Board did not, in its judgment, feel the President

should be notified of this dispute. The Carrier also seeks to hold these Brotherhoods responsible because the Carrier was not willing to arbitrate.

Nothing is more basic or settled than that the Railway Labor Act does not require the parties to a "major" dispute to agree. Nor does it require the parties to agree to arbitration. The Act does require the parties to negotiate in an effort to reach agreement, but they cannot be forced into an agreement against their free will.

In as much as the procedural requirements had been complied with, the right to self-help or strike in aid of collective bargaining existed on September 25, 1956, when the Brotherhoods were enjoined ex parte without hearing.

CONCLUSION

The several Brotherhoods here involved submit that:

(1) The findings of fact of the Chancellor are not only supported by the evidence, but are founded on uncontradicted evidence, and are entitled to the same weight as a jury verdict.

(2) That the dispute between these parties was a "major" dispute as that term is used in the Railway Labor Act, for the reason that the dispute involves the negotiation of a new agreement concerning "wages and travel expenses" occasioned by the change of the customary reporting and relief point from Port Norfolk to Berkley.

(3) That as the facts clearly show the dispute is a "major" dispute, the National Railway Adjustment Board has no jurisdiction of same.

(4) That the submission made by the Carrier to the Adjustment Board is a sham and device intended to confuse the issues on appeal; that said submission is not a part of the evidence or record and cannot be considered on appeal.

(5) That the Brotherhoods have complied with all procedural requirements so that the right to self-help or strike existed when these Brotherhoods were enjoined on September 24, 1956.

Therefore, the final order of the District Court entered on February 8, 1957, dissolving the temporary injunction granted by the Circuit Court of the City of Norfolk on September 24, 1956, and further extended by order of December 20, 1956, should be affirmed, with costs to these appellees.

Respectfully submitted,

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APPENDIX



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J. W. HAYES, SWORN
DIRECT EXAMINATION BY MR. MacMILLAN:

Q. Would you state your name, please.

A. J. W. Hayes.

Q. What, if any, is your relation to the defendants here?

A. I am general chairman for the Brotherhood of Railroad Trainmen on the Seaboard Airline and Norfolk and Portsmouth Belt Line.

Q. Where do you make your home?

A. Hamlet, North Carolina.

Q. How long have you been so associated or affiliated with Lodge 514?

A. Since June '55.

Q. And were you at all times pertinent or material to the issues here involved in that capacity?

A. Yes, sir.

Q. When did you first contact the complainant as to any dispute you had with it from which this proceeding has resulted?

A. November 25th, 1955.

Q. And what was the complaint or dispute that you had with the complainant at that time?

A. The hardships that would be imposed, namely, the travel time from Port Norfolk to Berkley and the expense by way of toll, bus and so forth.

Q. And did you anticipate an answer to that letter of November 25th?

A. Yes, sir.

Q. When did you receive an answer?

A. On February 10, 1956.

Q. And how was that answer communicated to you?

A. It was handed to me by Mr. White in his office He had requested through his road foreman, Mr. Jones, the best I remember, that we meet with him in his office on that date.

Q. Who was present on February 10th?

A. Mr. White, president and general manager of the Belt Line; Mr. Jones, who I understand is road foreman and trainmaster for the carrier; and Mr. Vaughan, Mr. Mathews, and Mr. Kay, and myself.

Q. When you met at that time what, if anything, did Mr. White have to say about the proposed change from Port Norfolk to Berkley?

A. Well, Mr. White told us at the outset of this conference that it wasn't called for the purpose of negotiating an agreement to cover this change in working conditions; that it was his position that under the contract rules then existing that he was privileged to make this change.

Q. Did he offer at that time to negotiate a new agreement for working conditions?

A. No, sir.

Q. Occasioned by the change?

A. No, sir. He told us frankly that that wasn't the purpose of the conference.

Q. Did you state to him on that occasion what your complaints were?

A. Yes, sir.

Q. And what, if anything, did you tell him?

A. That our complaints was the hardships, namely, the one hour travel time in each direction each day, and the expense involved, which at that time was 80 cents on public transportation.

Q. Is that one way or round-trip?

A. I understood that to be per day.

Q. Round-trip?

A. That would be round-trip.

Q. Did you or any of you representing the defendants at that time voice any opposition to the change from Port Norfolk to Berkley?

A. As best I remember, I told Mr. White at that time that we wanted the railroad to be able to utilize this Diesel power that they anticipated purchasing, or had already contracted to purchase, to the fullest extent, and that we had no objections to them having the men work anywhere on the property; that our complaint was the hardship imposed on our men by the change, and we felt some agreement should be worked out to cover it.

Q. Did Mr. White at that time give you any indication as to when the change might go into effect?

A. No, sir. He said it might be the next week or the following week; any time, a short while after this conference.

Q. Was there any suggestion that negotiations regarding this change in working conditions would be entered into before the change was to be made?

A. No, sir. He told us very definitely that he wouldn't entertain any conference for that purpose.

Q. What then did you do after the conference of February 10th, 1956, with Mr. White?

A. We immediately requested the Mediation Board to invoke its services.

Q. Did they invoke their services?

A. Yes, sir.

Q. And did they at that time take jurisdiction of the matter?

A. Yes, sir. As I understand it, they did. They sent a mediator in here to investigate.

Q. And the letter which we have just introduced was the letter which the board forwarded to the various defendants advising why they could not complete any hearings?

MR. WILLCOX: The letter speaks for itself. I would rather have the letter read than to have this characterization.

MR. MacMILLAN: Mr. Willcox is correct.

Q. Let me ask you this way: Is that the letter that you received from the board when they concluded jurisdiction of the matter?

A. That is right.

MR. WILLCOX: Is that the letter of March 5th, Mr. MacMillan?

THE WITNESS: That is right.

Q. Did you thereafter have occasion to again seek or accept the services of the Mediation Board, after the letter of March 5th which we have just referred to?

A. Yes, sir.

Q. What was that occasion?

A. Well, on April 26th as best I recall, bulletins were posted establishing Berkley Yard as reporting place for men in train service to be effective May 2nd, 7:00 a.m. And we set May 2nd, 7:00 a.m., as the date to withdraw the men from service, in protest to Mr. White's refusal to attempt to work out an agreement with us to cover the hardship imposed by these changes.

Q. What, if anything, did the Mediation Board do by reason of that notice of strike?

A. They took jurisdiction under emergency designated Case E-29, and, as I understand it, requested or required everybody to hold things status quo. Mr. Schoonover, mediator, was sent in to try to mediate the dispute.

Q. When did the complainant through any officer first offer to negotiate the hardship occasioned by this change?

A. It was after Mediator Schoonover conferred with both parties and told us —

MR. WILLCOX: I object to what he told.

Q. Wait a second. Was Mr. White present on that time?

A. Yes, sir.

Q. Mr. White, the present complainant?

A. Yes, sir.

Q. Who else was present?

A. Well, Mr. Vaughan, Mr. Mathews.

Q. Is that Mr. Vaughan the defendant?

A. Yes.

Q. Mr. Mathews the defendant?

A. Yes, sir.

Q. Who else?

A. Possibly Mr. Willcox. I am not sure. Maybe it was the superintendent, Mr. Burrows. But there was more than one person.

Q. Where did that occur?

A. In Mr. White's office.

MR. MacMILLAN: Just a moment. Mr. Willcox has an objection.

MR. WILLCOX: I don't object up to that point. I object to what Mr. Schoonover said.

Mr. Schoonover, your Honor, was a mediator. And all those conferences are traditionally confidential and privileged.

THE COURT: The question, if I understood it, Mr. Willcox, was what did Mr. White say or when did Mr. White first agree to negotiate.

MR. WILLCOX: If your Honor please, he has

answered that. We negotiated, the first time we negotiated — and there isn't any dispute about it — was when the Mediation Board stepped in. That is admitted. No controversy at all. Now, he has asked this witness to say what Mr. Schoonover said to Mr. White in these negotiations. For the reasons I have said and for the reasons I stated in my written motion, the testimony is inadmissible. In addition to that, Mr. Schoonover had no authority to decide any issue, and nothing he has said or decided or nothing he directed to do was effective or in any way effective as to the rights of the parties.

MR. MacMILLAN: Your Honor, he is exactly correct and to prevent any possibility of error in the matter, we are willing to withdraw anything that Mr. Schooner said in view of his admission that that was when he first negotiated, is when Mr. Schoonover entered the picture.

MR. WILLCOX: Mr. MacMillan, that is alleged in the pleadings. There has never been any question whatever about it.

MR. MacMILLAN: Your Honor, that is why we have put this witness on this morning, to attempt to clear up when negotiations began. There was some intimation in Mr. White's testimony that he was willing to negotiate this matter from the beginning. We are now attempting to contradict him on that score and to show no negotiations started until Mr. Schoonover entered the picture.

THE COURT: Of course, the fact no negotiation commenced until Mr. Schoonover entered the picture

would not necessarily conclude that Mr. White, president of the railroad carrier, would not have been willing to have negotiated, although Mr. Hayes has definitely stated that at the time of the first conference on or about February 10, 1956, that Mr. White refused to negotiate.

MR. MacMILLAN: We withdraw any question as to what Mr. Schoonover said because we concede it is not material. It is not binding on the complainant.

Q. What did you then negotiate with the complainant and the defendant? I am not asking you details or terms. What were the items in dispute?

A. The travel time from Port Norfolk to Berkley and the expense, transportation expense.

Q. Did Mediator Schoonover stay in the picture the entire period of mediation?

A. No, sir. Mr. White requested that the mediation proceedings be recessed for the purpose of getting authority, as I understand it, from the powers that be, the Belt Line Railroad to go into it further.

Q. I show you a letter, which I have already shown to Mr. Willcox, dated May 2nd, 1956. It is from Mr. White to Mediator Schoonover. I ask you if that is the letter which was written requesting a recess in mediation.

A. That is right. That is it.

MR. WILLCOX: If your Honor please, two letters have been introduced this morning and examination is being made in accordance with them. I suggest that it would be appropriate if Mr. MacMillan would

read them now so your Honor would know what we are talking about; unless your Honor has already read them.

THE COURT: The Defendant's Exhibit No. 2, which is a letter from the National Mediation Board to Mr. White and to various members of the Brotherhood, dated March 5th, 1956, I have glanced through, Mr. Willcox, at the time that it was handed to me. The general effect of that is the Executive Secretary of the National Mediation Board stated that the carrier had not moved the terminal from Port Norfolk to Berkley as was stated in the application; and apparently that they at that time refused to do anything further in the matter officially.

I don't know anything about the other letter Mr. MacMillan has reference to.

MR. MacMILLAN: If we might introduce this, your Honor, I will read it to the Court.

THE COURT: Defendant's Exhibit No. 3.

(Received in evidence and marked Defendant's Exhibit No. 3.)

(Mr. MacMillan then read to the Court Defendant's Exhibit No. 3.)

Q. How long did mediation continue and what mediators worked on this matter?

A. Well, it was recessed for several days there. Then Mr. Roadley, he was sent in.

Q. Continue and tell us the details, Mr. Hayes. Just tell us how long he stayed and how long you mediated to the best of your knowledge.

A. The best I remember, he stayed here three days and we passed proposals, I'd say, back and forth, through the mediator with Mr. White.

Q. Who represented the complainant throughout the course of mediation? Who was actually present during mediation?

A. I was there.

Q. The complanant? Who represented the complainant?

A. Oh, Mr. White, and Mr. Burrows and Mr. Willcox.

Q. And was any offer made of arbitration during mediation?

MR. WILLCOX: I object, if your Honor please. Totally immaterial, irrelevant.

THE COURT: The details of the offer would definitely be properly eliminated. But all Mr. MacMillan wants to know is whether any offer was made.

MR. WILLCOX: That is what we contend is inadmissible.

THE COURT: Isn't it a part of the negotiation? He has stated that proposals were passed back and forth. Now, I assume that no offer was ever accepted and that is the reason why the parties are here today.

MR. WILLCOX: That is correct, your Honor. It has been the position of the Belt Line from beginning to end that under the existing rules, which is a part of the bargaining contract, it had a right to make this change. On the other hand, the Brotherhoods have con-

tended that we did not have the right to make it, that that rule does not give us the authority and we can only make it as a result of negotiating with them. And that has been the issue throughout the entire thing.

THE COURT: I don't see how this question could hurt anybody. It is a yes or no question: were any offers made during the course of the negotiation. He doesn't have to say who the offers were made by. He doesn't have to say whether they were accepted. Just want a yes or no answer.

MR. MacMILLAN: Your Honor, I would like to state the reason for that question because I believe it is material. In order to obtain an injunction in this matter the complainant will have to show that it has exhausted the remedies available to it under the Railway Labor Act and to any administrative remedies it had. We will at the proper time urge that arbitration is one of the remedies which the complainant should have pursued at the time prior to maintaining an injunction to enjoin strike. We feel it is pertinent and we feel very strongly that we should be permitted to show what the evidence would show on that issue.

THE COURT: Offers?

MR. MacMILLAN: Not the contents of the offers, but where they originated from, and where any offer of arbitration originated from the complainant, which we feel to be more important than the arbitration offers that might have originated from the defendant.

THE COURT: Well, this gentleman has already testified, and I think Mr. White testified the other day, that proposals went back and forth between

the Brotherhood and the carrier through the mediator. If proposals went back and forward, I think the Court has a right to assume that no proposal was accepted. What difference does it make whether an offer went from the carrier to the Brotherhood? Same is a proposal, isn't it?

MR. MacMILLAN: Yes, sir, except that the law says that under the Railway Labor Ast you must exhaust the remedies available to you under the Act before you can proceed to get an injunction. And one of the remedies available to the complainant was arbitration. The president testified at the first day of hearing that no offer of arbitration was ever made. Now we want to show that offer of arbitration was made by the defendants.

THE COURT: Yes, I think it would be admissible as to that, Mr. Willcox.

MR. MacMILLAN: We offer it for no other purpose.

THE COURT: Didn't Mr. White testify the other evening that no offer of arbitration had been made?

MR. WILLCOX: I do not recall that he did, sir. My memory — I won't make the categorical statement that he did not; but I don't recall it.

THE COURT: I am sorry, gentlemen, my notes of the previous day's hearing are not before me at the present time and, of course, we can't go into the record. I have some faint recollection.

MR. MacMILLAN: My recollection is positive,

your Honor, because it was one of the questions I had down to ask Mr. White.

THE COURT: I will permit the question.

MR. WILLCOX: Save the point.

Q. (By Mr. MacMillan) Did the complainant at any time offer to arbitrate this dispute?

A. Not that I recall.

Q. Did you at any time offer to arbitrate this dispute or any phase thereof?

A. We offered —

MR. WILLCOX: Same objection.

A. — to arbitrate the matter of time involved and accept the transportation offered by Mr. White.

Q. To whom did you convey that offer to the complainant?

A. Mr. Roadley, the mediator.

Q. Do you know whether or not Mr. Roadley ever communicated that offer to the complainant?

A. I do not.

MR. WILLCOX: Now, if your Honor please, I move that it be striken out because it doesn't appear he ever communicated it to the complainant.

MR. MacMILLAN: We have no objection to that.

THE COURT: All right. Strike it out.

Q. After negotiations terminated with the mediator in Norfolk, Virginia, did you ever have occasion or did the

defendants ever have occasion to have any further negotiations during mediation?

A. Yes, sir, in Washington before a member of the Mediation Board.

Q. And tell the Court what occurred at that time.

Well, at that time we — I believe it was July 23rd — in Washington. The mediator met with us and then he would meet with Mr. White, and he finally made a proposal, Mr. Edwards of the Mediation Board, to us.

MR. WILLCOX: If your Honor please, that brings up admission of evidence, the same question that I put in my written motion to strike part of the answer.

THE COURT: Mr. White wasn't there, was he?

THE WITNESS: Yes, sir. He was in Washington.

THE COURT: I know he was in Washington, but was he present?

THE WITNESS: Yes, sir; all of us were present when the mediator made the proposal.

THE COURT: I am not interested in the details of the proposal.

MR. WILLCOX: He made a proposal. It is the details I am objecting to, your Honor.

Q. (By Mr. MacMillan) Who was present on July 23rd, 1956, in presence of the member of the National Mediation Board?

A. Mr. White, Mr. Willcox, Mr. Burrows, Mr. Vaughan, Mr. Bowen, Mr. Mathews, and myself and Mr. Jenkins, Mr. Millett, and Mr. Turner.

Q. You say a proposal came from the mediator, is that correct?

A. That is right, sir.

Q. Did you all negotiate on that proposal with the complainant?

A. Yes, sir. We talked about the wording of the agreement, of the proposal, and the different things that were included in it.

Q. After all the corrections had been made in the wording, what, if any, suggestion was made as to signing the agreement?

A. By the Mediation Board?

Q. By anyone present.

MR. WILLCOX: Your Honor, I object to that. Going into the details of negotiation and mediation. Regardless of what suggestion was made by anybody as to signing it, it doesn't affect this situation or the merits of this case in any way, shape or form.

THE COURT: Mr. MacMillan, bearing in mind that you have steadfastly throughout the hearing, at least passively, agreed that the details of these so-called negotiations were not pertinent, and in no way binding, what difference does it make as to what the mediator may have suggested as to the signing of any proposal?

MR. MacMILLAN: We are now directing our attention, your Honor, against the portions of the complaint and the portions of the answer which have been denied, which deal with the question of whether these defendants have bargained in good faith, have been

attempting in every way to dispose through negotiation of every dispute they have with the complainant. We intend to show that at this last negotiation, as we have alleged in our answer, that the complainant did not bargain in good faith and at a point when the parties had gotten down to a point of agreement the parties left the negotiating room, on the guise that they had to catch a boat, and left the city. We intend also to prove that which has been denied, that an agreement was entered into — not entered into, a proposal was prepared, signed by the parties and by the mediator. Now, that agreement consists of two parts: first, the cover of agreement, and second, the attached details of the agreement, setting forth the details. We do not offer or propose to offer over Mr. Willcox's suggestion any of the details of the agreement. We do submit that the cover page which shows how far the parties went to settle this dispute is admissible. And that is what we are now aiming at.

THE COURT: Well, Mr. White testified that this so-called written proposal was prepared by Mediator Edwards himself without any prior lengthy discussions with the parties and that he thereafter, I think, either sent it to the union or the Brotherhood members signed it perhaps there, and it was sent to the railroad. They did leave. I don't follow you exactly as to what the benefit that would be. A mediator makes a proposal, which may have been a portion of his own brainstorm or it may have been derived, as it undoubtedly was derived, after some discussion with the various parties. But in any event, the mediator comes forward and says,

"This is my idea of a good way to settle this whole controversy." So he puts it in writing. Now, is it lack of good faith on the part of the carrier if they refuse to sign that?

MR. MacMILLAN: No, sir. What the evidence that we are developing here is that the mediator came forward with the proposal. The proposal was then negotiated, the whole afternoon or most of the afternoon of July 23rd. After the parties had made correction in the language, back and forth between themselves, and there was a need to go forward and either sign it or to have further negotiation if necessary to come to a further agreement, the parties having been there only one day, the complainant then advises the mediator that it must catch a boat and leave the city, and the defendants proceeding in good faith stay on until the agreement as negotiated is prepared, sign the same, the mediator signs the same, and it is sent on to the complainant for signature and it is rejected. We submit that nothing in there binds the complainant, except it is admissible evidence to show how far the parties went to complete every requirement that they negotiate as a prerequisite of following their common law remedies.

THE COURT: Suppose that Mr. White, Mr. Willcox and Mr. Burrows and everyone else connected with the carrier had stayed over in Washington that night, all that night, sat up all night long, and then rejected it. What difference does it make from the fact it was subsequently mailed to them and they rejected it?

MR. MacMILLAN: There is a strong showing if they had stayed over and negotiated, — going further,

if they had complaints that they were negotiating in good faith, their leparture right at the time the parties were approaching a settlement, we submit, is evidence that they were bargaining in bad faith.

THE COURT: There is no indication yet. They did discuss these various proposals. But is there any indication, that standing alone, that their failure to stay on all night long? Who could testify — could Mr. Hayes testify that if they had stayed on two hours more they would have reached an agreement?

MR. MacMILLAN: No, sir, he cannot.

THE COURT: Who can testify?

MR. MacMILLAN: No one can, except their departure at a time when they had been called before the board to settle this dispute is evidence that they were not bargaining in good faith.

THE COURT: I don't agree with you. After all, they could have come back the next day or two days later if the mediator had said "Let's adjourn until such and such a day." If you want to put in evidence the mediator then requested the carrier's officials to come back two days later and they said, "No, we are not coming back." But the mere fact they said, "We have got to leave, we have got to catch a boat to go to Norfolk," I couldn't possibly say that that is evidence of bad faith, just because someone is going to leave to catch a boat to go to Norfolk — any more than Mr. Willcox very vigorously opposed my night session the other night, and still does vigorously oppose it.

But I don't see where that is evidence of bad faith

in and of itself at all. I think you have effectively shown that there was considerable negotiation on these proposals, whatever the proposals may have been. If thereafter, when the railroad wrote a letter up there and said "We decline to go into this proposal" or "We reject it," there had been further evidence of efforts to get them together and they arbitrarily refused, why, that might have been some evidence there of failure to bargain. But I think you have effectively shown what you want to show and that is that there were negotiations between the parties looking toward a settlement of the controversy.

MR. MacMILLAN: Yes, sir, and we submit that we would like to offer in evidence at this time the proposal signed by the member of the National Mediation Board and the parties which showed that that was the ultimate that they could do to settle this dispute. We feel that it is evidence of that and should be admitted.

THE COURT: Let it be marked Defendant's Exhibit No. 4 refused.

(Marked Defendant's Exhibit No. 4 refused.)

MR. WILLCOX: Refused?

THE COURT: Yes.

Q (By Mr. MacMillan) Mr. Hayes, did you at any time negotiate with the complainant over his right to move the place of reporting and relief from Port Norfolk Berkley?

A. No, sir, not as such. We were trying to get Mr. White to negotiate an agreement to cover the hardships and expense imposed on the men by this change.

Q. Did you ever deny that the carrier had the right to make this change?

A. No, sir; they have that right. That is the prerogative of the management.

Q. Why did the defendants schedule the strike which was called both on May 2nd, 1956, and September 26, 1956, for the same hour which the carrier had scheduled the move from Port Norfolk to Berkley?

A. Well, that was the date and time that these hardships would have been imposed by this change on the men and an agreement had not been worked out to take care of this one hour travel time in each direction and this expense involved which we considered hardship.

Q. Do the members of your lodge want to go to Berkley without an agreement covering these working conditions?

A. No, sir, not without an agreement to cover it.

Q. Are they working against their will in Berkley today?

A. Well, they are, I'd say, and will be until an agreement is worked out to cover these hardships that are being imposed on them, yes, sir.

MR. MacMILLAN: Judge, there have been introduced three letters. Mr. White has admitted the letters and we have admitted the letters. They are set forth in full in the answer and I believe some of them appear in Mr. Willcox's complaint. Would that be sufficient for the Court to have those letters available to it, or do you want us to introduce the originals?

MR. WILLCOX: Which letters are you speaking of?

MR. MacMILLAN: From the defendants to the complainant under date of November 25, 1955.

THE COURT: That is set forth in the answer under paragraph 11 (a).

MR. MacMILLAN: The second letter is February 10th, 1956, which is a letter from Mr. White to the various defendants.

THE COURT: That is set forth in the answer under paragraph 11 (b).

MR. MacMILLAN: And the third letter is the letter of February 13, 1956, from the defendants to the complainant, Mr. White.

THE COURT: And that is set forth in defendants' answer under paragraph 11 (c).

Those are the only letters. There is no objection to those as such?

MR. WILLCOX: No, sir. I think we stipulated.

MR. MacMILLAN: I wanted to make it clear that I wasn't going to offer the letters; that the letters as set forth in the answer would be proof.

THE COURT: Let the record so indicate.

MR. MacMILLAN: Answer Mr. Willcox.

CROSS-EXAMINATION BY MR. WILLCOX:

Q. Mr. Hayes, there isn't any doubt in the world about the fact that this controversy centers around the men's claim that they are entitled to time and expense for travel from Port Norolk to Berkley?

A. I don't know that I understand your question, Mr. Willcox.

Q. Let me make it a little plainer so you can.

THE COURT: You are talking about this controversy right now?

MR. WILLCOX: The controversy between the Brotherhoods and the railroad company which led to this situation.

Q. I think you have testified to it but I just want to get it straight. You admit that is a prerogative of management, the railroad company has a right to use Berkley Yard as a starting point and stopping point of trains?

A. They have that right.

Q. And you contend and the Brotherhoods contend that as a condition precedent to exercising that right they must negotiate an agreement with the Brotherhoods providing for what you call the hardships, that is, the time consumed and the expense; that is correct, isn't it?

A. I didn't say that that was absolutely necessary. I don't think, Mr. Willcox, I said that was our purpose in trying to negotiate an agreement to cover those hardships. That is what we were protesting, the fact that it hadn't been done.

Q. Those hardships have been the subject of the negotiations, haven't they?

A. They have, yes, sir.

Q You speak of an hour's time in each direction. You know how far it is from Port Norfolk to Berkley Yard?

A. Well, that depends on the way you go, sir.

Q. Take the most direct route through the tunnel and into Berkley.

A. The best I recall, we have it here in this file, something around —

Q. Four and a half miles, isn't it?

A. The most direct route, around five miles.

MR. MacMILLAN: I might help, Mr. Willcox. We have not taken issue with the testimony of Mr. Bowen, I believe the name was, as to the distances and expenses involved.

I will tell Mr. Willcox in advance, we will offer a witness who will prove the time and expense involved to go by public conveyance, which Mr. Bowen omitted. But other than that, we have no objection to their testimony.

Q. (By Mr. Willcox) Mr. Hayes, it doesn't take an hour to go from Port Norfolk to Berkley Yard, does it, by either route, unless you go around the toll free route?

A. Mr. Vaughan, of our organization —

Q. I am not talking about Mr. Vaughan. I am talking of your own knowledge.

A. Well, I never have been over there, Mr. Willcox. Mr. Vaughan has timed it. He can answer the question.

Q. Let's talk about the modus operandi of the mediation. Is it not a fact that when the mediator, Schoonover came down here that we all met in the terminal building at the Union Station and that you and your associates were in one room, Mr. White and Mr. Burrows and I were in another?

A. Part of the time, that was the case.

Q. And Mr. Schoonover went in and talked to you in our absence?

A. That is right.

Q. And then he came in and talked to us in your absence?

A. That is right. And then we all talked.

Q. And then at least once and possibly [illegible] together and had a general discussion?

A. That is right.

Q. Now, when we went to Washington you were there, weren't you?

A. That is right.

Q. And most of us or several of us met outside the building and went in the building together; that is correct, isn't it?

A. Yes, sir, to begin with.

Q. To begin with. And then they separated us. They put the Brotherhoods in one room and put us in another?

A. That is true.

Q. And Mr. Edwards went backwards and forwards?

A. Yes, sir.

Q. And we, of course, don't know what he said to you all and you, of course, don't know what he said to us?

A. No.

Q. And the only time we got together was late in the afternoon?

A. That is right. It was at the time he made the proposal to all of us.

Q. And that was the only time that we got together there?

A. Yes, sir.

Q. You speak of the hardships. Some of the employees, most of them I believe, live in Portsmouth, do they not?

A. A good many of them, yes, sir.

Q. Some live in Norfolk?

A. Some, yes, sir.

Q. And some live in Berkley or South Norfolk?

A. I couldn't testify to that.

Q. Well, assume that to be a fact. Going to Berkley Yard is no hardship on those people, is it?

A. Not those few that live in that community.

Q. And it's no hardship on those that live in Norfolk, is it, as against Port Norfolk?

A. No, sir.

Q. And under the agreements and the working rules of the Brotherhood, men have a right to bid on jobs according to their seniority?

A. That is right. May I qualify that last answer?

Q. Yes, sir.

A. By saying that in this proposed agreement, and in our negotiations, we agreed that these men that live —

Q. One minute now.

MR. WILLCOX: If your Honor please —

MR. MacMILLAN: Your Honor, he has gone into it and this witness has a right to tell him what the truthful part of the negotiations were and why the questions which he was asked are irrelevant.

MR. WILLCOX: If your Honor please, I did not ask the question. It is not responsive to the question. He said he wanted to qualify it and is going into the details of the negotiations which your Honor said are ruled out.

THE COURT: I don't want any details of the proposals, Mr. Hayes.

MR. MacMILLAN: Judge, may I point out something here, to show you how material his answer was. He was asked whether it would be a hardship on men living in South Norfolk, Norfolk, Portsmouth. His answer was no. He then led him into a statement which was not a hardship therefore on the defendants. Mr. Hayes was pointing out that the negotiations didn't revolve about the men in Norfolk, Portsmouth, or South Norfolk. The negotiations dealt only with the men in Port Norfolk where the hardship existed.

THE COURT: I understand either from your opening statement or from Mr. Willcox's opening statement, or perhaps from the evidence somewhere, that the only complaint, if you want to refer to it as a complaint, is with respect to the travel time and the expense involved of the men who were living in the Port Norfolk area and were required to previously report to Port Norfolk and are now being required to report to Berkley.

MR. WILLCOX: If your Honor please, your Honor and I are not quite in agreement as to the purposes of the negotiation. The dispute is as to the hardship, as he calls it, of going from Port Norfolk to Berkley. But I don't want your Honor to rest under the impression that the demands have been limited to the people who are going to Portsmouth.

THE COURT: Do you want to go into that?

MR. WILLCOX: No, sir, I do not. But I don't want your Honor to assume that.

THE COURT: I can't assume anything else. I don't know who else would be affected.

THE WITNESS: That is right.

MR. WILLCOX: Well, if your Honor please, then if your Honor is going to assume that they were dealing only with the men who live in Portsmouth, we will have to go into it, because actually they said it applied to every man in the first instance. Now, in the last negotiation they got away from that, it is true.

THE COURT: I don't know. You have zealously protected all evidence of these negotiations through the mediator

MR. WILLCOX: Exactly, sir.

THE COURT: I can't presume what they are.

MR. WILLCOX: That is my only question now. But your Honor said you would assume.

THE COURT: I could only assume, from the evidence thus far presented, that the complaint has been with respect to these Port Norfolk men who the

Brotherhood contends by reason of a changed working condition are now required to take more travel time, for which presumably they do not get paid, and more travel expense by reason of toll routes in reporting to Berkley. Now, I don't know how a man who lives in Berkley within one block of the Berkley Yard could have a complaint.

MR. WILLCOX: If your Honor please, what I am disturbed about is your Honor's assumption, because —

THE COURT: What else am I going to assume?

MR. WILLCOX: You assume what the facts show: That this plan was to abolish certain trains, or crews as they are called, that were operating out of Port Norfolk and in lieu thereof to start operating trains out of Berkley Yard. And the answer is that they have been reporting at Port Norfolk since 1897 and they don't want to go to Berkley without negotiations. The assumption about residence — there is nothing in the evidence about residence.

THE COURT: Mr. Burrows testified I believe the other night that there were some people who lived over here at Norfolk who reported to Port Norfolk.

MR. WILLCOX: Correct.

THE COURT: I agree with you there. Now, I don't see how those men could be adversely affected. If they live in Norfolk and have to report in Port Norfolk — rather than reporting there they are reporting to Berkley, if anything, I would think that would be easier on them by reason of my knowledge of the general area. But he did testify, as I recall — I don't have

my notes but I have it in my notes in my office — as I recall, Mr. Burrows said there were eight men that lived in Norfolk who reported at Port Norfolk. I may be incorrect.

MR. WILLCOX: Your Honor is absolutely correct, sir, and eight who live in Portsmouth that report at Sewells Point.

THE COURT: And eight who live in Portsmouth who report at Sewells Point. Now, perhaps I didn't word myself correctly. I meant to convey the impression that I didn't see how anybody could be adversely affected excepting those men who lived in the Port Norfolk area.

MR. WILLCOX: All right, sir.

THE COURT: That is what I intended to convey.

MR. WILLCOX: All right, sir. Then I am through with that subject.

Q. (By Mr. Willcox) Mr. Hayes, have you with you the copy of the telegram that you sent to the Mediation Board in February?

A. I will have to check this file; if you will bear with me.

Q. When this matter was first reported to them. February 13th I think is the date of it.

A. Yes, sir, I have a copy of it here.

Q. Will you read it.

A. Addressed to Mr. E. C. Thompson, Secretary, National Mediation Board, Washington, D. C. says: "Serious situation existing on Norfolk Portsmouth Belt Line Railroad

as the result of management arbitrarily moving the terminal from Port Norfolk to Berkley, a distance of approximately six miles, without negotiating with committees. Request your board take immediate jurisdiction and notify carrier to hold matter status quo pending mediation proceedings. Letter follows."

Q. That is the telegram that you sent?

A. That is the telegram that was sent, yes, sir.

Q. Mr. Hayes, since this move has been made, has any member of the Brotherhood of which you are the general chairman filed a time claim for the time involved in going to Berkley Yard or for the expense incurred?

A. No, sir. We don't have a rule to cover it. We haven't been able to negotiate an agreement to cover that.

Q. None has filed a claim?

A. None has reached me.

Q. Has any member of the Brotherhood with which you are connected filed any claims of any kind growing out of the move since the move was made?

A. Not to my knowledge, Mr. Willcox. When we make claims we have to have a contract rule to base them on and we don't have any covering this situation.

Q. Do you mean to say that you have no contract rule that would entitle the men to claim extra pay for the time involved?

A. No, sir. That is what we were trying to negotiate, a rule to cover this particular move here and hardship that was imposed.

Q. Let me be sure that I get you right. I don't want to be confused myself. As I understand you now, you admit that there is no rule in force on which you could base a claim, on which the employees could base a claim for compensation during the time consumed in travel from Port Norfolk to Berkley and return?

MR. MacMILLAN: Mr. Willcox, we have admitted that in the answer.

A. We have said that, yes, sir. That is the truth.

Q. And what you want to do is to negotiate a contract or a rule which will entitle you to that?

A. That is the truth, yes, sir. And as stated to you and to Mr. White in conferences, we feel that it is incumbent upon the railroad to serve notice under the Railway Labor Act when they intend making such change.

Q. We understand that. That is your contention. Now, what is the time limit in which a trainman can put in a time claim after he has done the work?

A. I think it's 60 days — 45 — 60; under the agreement.

MR. WILLCOX: That is all, Mr. Hayes.

C. W. MATHEWS, SWORN

DIRECT EXAMINATION BY MR. MacMILLAN:

Q. Will you state your name, please?

A. C. W. Mathews.

Q. Where do you live, Mr. Mathews?

A. Norfolk.

Q. What is your relationship to the defendant Lodge 76?

A. General Chairman, Brotherhood of Locomotive Firemen and Enginemen.

Q. How long have you been General Chairman?

A. Twenty-eight years.

Q. Were you General Chairman in 1941 and '42?

A. I was.

Q. Were you General Chairman when the complainant moved the place of reporting and relief from Port Norfolk to Money Point?

A. I was.

Q. What, if anything, did the Brotherhood do at that time as to filing time claims?

A. The men filed claims and we progressed those claims to and through the highest operating officer on the Belt Line Railroad.

Q. What, if anything, was done in regard to those claims thereafter?

A. We found that the National Railroad Adjustment Board didn't have jurisdiction.

MR. WILLCOX: If your Honor please, that is a question of law. We don't consider ourselves bound by it.

MR. MacMILLAN: We don't say that you are bound by it. We are just saying that that is what occurred.

Q. What then thereafter occurred to those claims?

A. Well, they abolished Money Point thereafter.

Q. You say you found the Adjustment Board did not have jurisdiction?

MR. WILLCOX: If your Honor please, I object to the question. I move his last statement on that be stricken out because it is a question of law whether the board has jurisdiction or not.

THE COURT: One of the main objections is that Mr. MacMillan is trying to prove a fact. Now, if he is trying to prove a fact there ought to be something of record of that. You can't just let Mr. Mathews testify what the board did as a factual situation.

MR. MacMILLAN: We are not offering his testimony, your Honor, as to jurisdiction of the board. We are asking him the reason why the claims were not processed.

THE COURT: How does he know?

MR. MacMILLAN: He has given the reason why they abandoned them at that time as a matter of fact.

THE COURT: How does he know that?

MR. MacMILLAN: He is not asserting that he knows that. He is giving that as the reason, whether the reason was right or wrong.

THE COURT: His reason?

MR. MacMILLAN: I asked him why the claims were not processed. And he is saying.

THE COURT: You mean that he, Mr. Mathews, because he reached the conclusion that the board did not have jurisdiction?

MR. MacMILLAN: That is correct.

THE COURT: Oh, well. I think that is admissible, Mr. Willcox.

MR. WILLCOX: All right, sir.

Q. (By Mr. MacMillan) Did you so advise the complainant as to why you were withdrawing those claims or why you were not processing those claims to the board?

A. Yes, sir, we did.

Q. Who did you advise?

A. Mr. H. L. White.

Q. What was his capacity with the complainant at that time?

A. Vice-president and general manager.

Q. Where did you so advise him?

A. In the board room in the Union Station in Norfolk.

Q. Who was present at that time?

A. Mr. Hedges and Mr. Lavine, Mr. Early, Mr. Crawford and myself.

Q. Did you advise him that it was a negotiable matter?

A. We did.

Q. And what occurred thereafter as to the Money Point place of reporting and relief?

A. Well, they abolished the Money Point and the operation was carried back to Port Norfolk and we were under pay until the time we got back to Port Norfolk and also transported by the company's conveyance, station wagon.

(The answer was read by the reporter.)

MR. WILLCOX: Underpaid?

THE WITNESS: I said we were under pay. We were paid from the time we left Port Norfolk until we were relieved at Port Norfolk.

Q. How long was the Money Point operation maintained?

A. I would say approximately nine or ten months.

Q. Has it been the practice of the carrier to pay men and transport them on company time from Port Norfolk to Berkley?

A. Yes, sir.

Q. I mean prior to this dispute?

A. Yes, sir.

Q. Would the members of your lodge be working in Berkley if it were not for the injunction that has been entered in this Court?

A. No, sir. The members, they voted 100 per cent to strike the carrier unless it gave them a working agreement or working conditions according to the change.

THE COURT: I don't understand this Court entered the injunction.

MR. MacMILLAN: If I said that, I was in error, your Honor.

THE COURT: I just want to get the facts right.

Q. Are the men working in Berkley against their will?

A. Yes, sir, I would say they are.

MR. MacMILLAN: Answer Mr. Willcox.

CROSS-EXAMINATION BY MR. WILLCOX:

Q. Mr. Mathews, I understood you to say the last that you were paid — I am speaking now of the 1941 job when you were at Money Point — for time from Port Norfolk to Money Point and return?

A. No, that was the dispute, Mr. Willcox. We were after an agreement for the pay, transportation and time consumed traveling to and from Berkley.

Q. You were not paid then?

A. No, sir.

Q. And you put in claims?

A. Yes, sir.

Q. And did not progress them beyond the company-

A. We didn't.

MR. MacMILLAN: Mr. Willcox, his question was directed what did the company do after they abandoned Money Point and he said at that time they were paid.

MR. WILLCOX: I understand him.

THE WITNESS: I said after they abandoned, the operation was carried back to Port Norfolk and we were placed first in taxicabs and then station wagons and carried over there and our time began when we reported at Port Norfolk and ended when we relieved at Port Norfolk.

Q. You are talking now about the footboard relief down at the fertilizer section?

A. That is right; Money Point.

Q. And also the footboard relief at the Ford plant?

A. That is correct.

Q. And those are the two times you are talking about. You say the men are working in Berkley against their will?

A. I'd say yes.

Q. Does that apply to those who live in Norfolk too?

A. Well, Mr. Hayes, I think he cleared that. I don't know about the ones that live in Norfolk.

Q. Does it apply to the ones that live in Berkley?

A. I guess it would apply to all. I don't know. I couldn't express the men's opinion, Mr. Willcox. I don't know.

Q. What objection can a man who lives in Norfolk have to reporting to Berkley Yard rather than to Portsmouth?

A. We took that into account. And the men in Norfolk are not involved.

Q. That isn't the question I asked you. What objection could a man who lives in Norfolk have to reporting to Berkley Yard instead of to Port Norfolk?

A. Well, I don't know. Of course, I can only speak for myself.

Q. It would be easier to get to Berkley, wouldn't it?

A. Absolutely. For me, it would.

Q. Easier and cheaper?

A. That is right.

Q. And you live in Norfolk?

A. That is right.

Q. And the same thing is obviously true of those who live in Berkley. And if nobody else wants those jobs the men who live in Norfolk and are now reporting to Port Norfolk could bid them in?

A. Anyone who has seniority can bid on any job.

MR. WILLCOX: That is all.

FOY K. VAUGHAN, SWORN

DIRECT EXAMINATION BY MR. MacMILLAN:

Q. Tell his Honor your name, please.

A. Foy K. Vaughan.

Q. And where do you live?

A. 313 Chautauqua Avenue in Portsmouth, Virginia.

Q. What is your relation to the defendant Lodge 514?

A. Local chairman.

Q. How long have you been local chairman?

A. Approximately nine years.

Q. Mr. Vaughan, have you had an opportunity to make an investigation of the time and expense involved to go by public conveyance from Port Norfolk to Berkley Yard?

A. Yes, sir, I have.

Q. First let me ask you what time it takes to go from Port Norfolk to Berkley by public conveyance.

A. It took me one hour and four minutes.

Q. What public conveyance did you use?

A. I used bus; bus through the tunnel and South Norfolk bus on the Norfolk side.

Q. What, if any, lay-overs did you have in going from Port Norfolk to Berkley? How many busses did you have to catch?

A. Three.

Q. And how far did the last bus place you from the point of reporting?

A. Approximately a half a mile.

Q. What expense was involved in going by public conveyance from Port Norfolk to Berkley?

A. Forty cents each way at that particular time; and it is forty-two now, the fare being increased two cents in Portsmouth.

Q. So the total expense is 84 cents, is that correct?

A. Yes, sir.

Q. Did you also measure the time it took you to go by public conveyance from Berkley to Port Norfolk?

A. That morning, yes, sir; on return.

Q. From Berkley to Port Norfolk, how long did that take?

A. It took me exactly one hour in return to Port Norfolk.

Q. Did you have opportunity to go any other time during the day to determine whether it would take any longer?

A. Yes, sir, I left Port Norfolk at 1:20 and returned to Berkley by the same route.

Q. Did you find any time variance during various times of the day?

A. Yes, sir; it took me one hour and twelve minutes, going back to Berkley in the afternoon leaving Port Norfolk at 1:30.

Q. What time did you find it took you to go from Berkley to Port Norfolk?

A. Excuse me just a minute. I left Berkley at 2:40, the yard office at 2:40, and returned to Port Norfolk and it took me one hour and twenty minutes.

Q. So what is your overall travel time by public conveyance from Port Norfolk to Berkley and Berkley to Port Norfolk?

A. Judging from the connections that I made in these tours that I made, I would say from approximately two hours and twenty minutes would be an average.

Q. Has the carrier prior to the arising of this dispute ever furnished transportation and travel time from Port Norfolk to Berkley for members of your lodge or you personally?

A. Yes, sir.

Q. And has that been the practice prior to this dispute?

A. Whenever they had an engine in Berkley that they wanted to be relieved without sending the engine to Port Norfolk, yes, sir.

Q. Would the members of your lodge be working in

Berkley if it were not for the injunction entered in this cause?

A. No, sir.

Q. Are the men being worked in Berkley against their will at this time?

A. I would say yes, sir.

MR. MacMILLAN: Answer Mr. Willcox.

CROSS-EXAMINATION BY MR. WILLCOX:

Q. You talked to all of them, Mr. Vaughan?

A. Mr. Willcox, I talked to every man and every man had an opportunity to —

Q. Wait a minute now. My question: You have talked to all of them?

A. Well, I would say yes, sir, the biggest proportion of them.

Q. Have you talked to those men who lived in Berkley

A. Yes, sir.

Q. Haven't they said they wanted the jobs?

A. No, sir.

Q. Are you sure of that?

A. That had an opportunity to bid for them.

Q. I understand. But didn't they fail to bid because of the strike vote?

A. I wouldn't say that.

Q. You mean to say the man who lives in Berkley would rather go to Port Norfolk and report than go to Berkley Yard?

A. No, sir, I don't mean that, Mr. Willcox.

Q. I didn't think you did.

A. No, I don't mean that.

Q. You say the company has furnished transportation to Berkley. Those have been the instances of the footboard relief at the Ford plant?

A. No, sir.

Q. They don't do it there?

A. Oh, they do it there.

Q. And they have done it at Money Point?

A. Yes.

Q. And sometimes they have an emergency and they have to send a crew over there and they do it then?

A. In Berkley Yard, yes, sir.

Q. But they don't do it regularly because they don't transport crews regularly except the Ford plant and the Money Point plant?

A. That is right.

Q. Mr. Vaughan, have you tested the time in an automobile?

A. Yes, sir.

Q. How long did it take you?

A. Excuse me and let me get my notes correct here.

Mr. Willcox, my figures vary a little from Mr. Bowen. I took my automobile and set the trip mileage on the speedometer and left from the Port Norfolk Yard office and went the toll free route and the distince was eleven and a half miles by the speedometer.

Q. That is the longest way you can possibly go?

A. That is right.

Q. Isn't it?

A. That is right. I left at 8:10, when there wasn't any traffic because I wanted the benefit of the doubt when I made the trip and it took me thirty minutes.

Q. Have you tried it by going through Western Branch Road and down County Street and through the tunnel?

A. No, sir.

Q. You haven't tested that?

A. No, sir.

Q. And that is the most direct route?

A. And the most expensive.

Q. And most direct?

A. Yes, sir.

Q. Have you tried it over Jordan's Bridge?

A. Yes, sir, on the same date.

Q. How long did that take you?

A. I left the yard office at 8:15 and arrived at Port Norfolk Yard office at 8:35 p.m. and by car, setting the speedometer, checked five and seven-tenths miles.

Q. That was twenty minutes?

A. Twenty minutes. No traffic.

Q. That is longer than the toll route?

A. You mean the toll free route?

Q Than the tunnel route. From Port Norfolk via the Jordan Bridge is longer than going through the tunnel to Berkley?

A. Oh, yes.

Q. As a matter of fact, do not a great many of the men go to work in automobiles?

A. I would say yes, sir.

Q. And do they not have pooling arrangements whereby a crew will ride with one member of the crew?

A. Now, I can't testify to that.

Q. Don't you know that some of them do, Mr. Vaughan?

A. I wouldn't testify to it because I haven't been to Berkley. I haven't been over since the crews have been going over.

Q. I am talking about even to Port Norfolk, a lot of them come there, don't they?

A. Not that I know of.

Q. A lot of them go to Sewells Point that way?

A. We did during World War II.

Q. Don't you now? Don't the men now who work at Sewells Point get together and ride in one automobile?

A. I couldn't testify that and tell the truth because I haven't seen it going on in the office I work on the railroad.

Q. You haven't?

A. I stated we did do it during World War II to save gas and all.

Q. You know the space over there at Port Norfolk where the crews have been reporting, don't you?

A. That is right.

Q. And that is filled with automobiles all the time, isn't it?

A. That is right.

Q. Have you ever worked the Sewells Point job?

A. Yes, sir.

Q. Didn't you go down in your automobile?

A. Yes, sir.

Q. Didn't some of the trainmen ask you to take them with them?

A. No, sir.

Q. Did you take any with you?

A. No, sir, not the last few times I have been down there.

Q. I am not talking about the last two times.

A. I just testified that during World War II we pooled our cars to try to save time. We had a limit on gas.

Q. Now you all go in separate cars?

A. Mr. Willcox, to answer that question, fortunately I have been on the railroad and have seniority enough living in Portsmouth that I didn't have to go to Sewells Point unless I caught an emergency job. When I did I drove my car and no one rode with me.

THE COURT: When you spoke of the most expensive route being through the tunnel, you meant I take it from the standpoint of the payment of tolls, did you not, Mr. Vaughan?

THE WITNESS: Yes, sir.

THE COURT: You have not considered, of course, the total overall cost of operating a person's vehicle from the standpoint of gas and depreciation?

THE WITNESS: That is right, sir.

MR. WILLCOX: If your Honor please, maybe better put that in the record.

Q. The toll fare on the tunnel, Mr. Vaughan, is 30 cents for a car and driver and 5 cents for each additional passenger?

A. Yes, sir.

Q. On the Jordan Bridge I believe the round-trip fare is 35 cents?

A. For car and driver.

Q. How much for additional passengers?

A. Five cents for each additional passenger.

Q. Each way?

A. Each way, yes, sir.

THE COURT: Anything further of Mr. Vaughan?

MR. MacMILLAN: Your Honor, we rest.

MR. WILLCOX: We rest, your Honor.

MR. MacMILLAN: Your Honor, I might ask one question of Mr. White. It just occurred to me. I nitended to ask him and forgot it.

THE COURT: Mr. White was sworn the other day. No need to swear him again.

HARRY L. WHITE, JR., RECALLED

EXAMINED BY MR. MacMILLAN:

Q. Mr. White, during the course of mediation, either in Norfolk or in Washington, was any offer of arbitration made to you by the defendant?

THE WITNESS: Do I have to answer that question, Judge?

MR. WILLCOX: If your Honor please, that is a question I understood you to rule out.

THE COURT: No, I ruled out the details of any offer. I didn't rule out —

MR. WILLCOX: I object to it on the ground that it is immaterial and irrelevant.

THE COURT: Objection overruled.

A. Judge, as Mr. Willcox has brought out, the mediator, during the five-day session in Norfolk and the time that we were in Washington and on other occasions, had suggested all the possible means of settling the dispute. But we did not receive a direct offer from the other side to arbitrate. We did not make a direct offer to arbitrate. It was just one

of the suggestions that were made I suppose to both sides by the mediator. We have not received any offer to arbitrate from the organizations nor have we made any.

Q. Did the mediator communicate to you any offer from the defendants to arbitrate?

A. He did not specifically ask us if we would arbitrate.

Q. Did he —

A. This is behind closed doors now.

Q. I am not asking you did he specifically ask you to. I am asking you whether he communicated to you an offer from the defendants to arbitrate.

A. He did not. He consistently said they would not arbitrate; that they would not go to the mediation — I mean to the Adjustment Board or would not consider a special system board of adjustment. That file, the last telegram we got closing out the case —

Q. I am asking you now about Norfolk. We'll get to the other in a minute. You said no offer of arbitration was ever communicated to you by Mr. Roadley?

A. It was not.

Q. But suggestion of arbitration was made?

A. No. He mentioned the ways that the case could be progressed. We told him from the outset that we had a rule in the book which we thought gave us a right to make this change; we did not feel negotiations were necessary. We hadn't offered to negotiate. We hadn't received a request. The only thing that the file will show, and the Brotherhood's records will show, that they made the statement we had no

right to make the change without negotiations in accordance with the Railway Labor Act as amended.

Q. You are saying that at no time did Mr. Roadley communicate any offer of arbitration from the defendants?

A. He did not.

Q. Now, when the National Mediation Board proffered arbitration at the conclusion of the case, you did not accept arbitration then, did you?

A. They did not proffer arbitration.

Q. I don't mean proffer it. They inquired whether you desired to arbitrate?

A. They never mentioned arbitration.

MR. WILLCOX: The letter speaks for itself, Mr. MacMillan, if you are talking about the letter from the Mediation Board.

MR. MacMILLAN: I am.

MR. WILLCOX: Look at the letter.

A. Sure it was introduced the last time. It is a letter of June 30th, I think.

THE COURT: Here is a letter of June 30th, introduced as Plaintiff's Exhibit No. 1, signed by E. C. Thompson, Executive Secretary of the National Mediation Board, addressed to Mr. White, and also to the several presidents or grand chief engineers of the Brotherhoods. Do you wish to see it, Mr. MacMillan?

MR. MacMILLAN: I am attempting to find that letter and the complainant's reply to the letter.

MR. WILLCOX: Both in evidence.

MR. MacMILLAN: Just so they are in evidence.

MR. WILLCOX: We offered just one paragraph and you offered the whole letter from the complainant.

Q. (By Mr. MacMillan) Mr. White, did you ever have any communication with the Mediation Board after the letter of July 30th addressed to you from Mr. Thompson? Look at that letter.

A. I have a file there I'd like to get to refer to it. I have a complete record of everything that has happened.

Q. I show you a letter designated Defendant's Exhibit 1 and ask you if that is the letter you wrote in response to the letter dated July 30th, '56.

A. That is the letter.

Q. Did you have any other correspondence other than those letters on the question of arbitration?

A. We haven't had any correspondence. We had no correspondence on negotiations in connection with arbitration as such.

Q. That is not my question.

A. You mentioned arbitration.

Q. I beg your pardon. You might have misunderstood me.

A. No. I understood you to say arbitration.

A. After the letter of August 13th, which you wrote Mr. Thompson, have you had any other letters from the Mediation Board dealing with the question of arbitration? The answer is either yes or no.

A. I have to have time to look at my file.

Q. That is all I am asking. You are welcome to examine the file as much as you need.

A. I have had several letters since that time.

Q. Did any of them deal with the question of arbitration?

A. None whatsoever.

Q. I am talking about after August 13th now. None dealt with arbitration?

A. (Shaking head in negative.)

Q. Did you ever accept the suggestion of arbitration as contained in the letter of Mr. Thompson to you under date of July 30th?

A. That is not arbitration, sir. That was a special system board of adjustment, which is quite a distinction between arbitration. We didn't talk about arbitration.

Q. You didn't talk about it?

A. No, sir.

Q. And you didn't offer?

A. Didn't offer; because we have consistently contended —

Q. Just answer my question. You did not offer arbitration?

A. We did not offer arbitration.

THE WITNESS: May I say a word there, Judge, in that connection?

THE COURT: I guess you had better get Mr. Willcox —

THE WITNESS: I will wait until he asks me then.

REDIRECT EXAMINATION BY MR. WILLCOX:

Q. Mr. White, Mr. Mathews said that in 1941 he advised you that the railroad employees were abandoning their time claims in connection with Money Point because they had found out that the Adjustment Board did not have jurisdiction. Did you ever receive any such advice?

A. No, sir.

Q. In connection with the questions that Mr. MacMillan just asked you about arbitration. I thought I understood you to say that one of the mediators said the men would not arbitrate?

A. They did.

Q. You remember which one that was?

A. Mr. Roadley.

Q. Now, August 13th you replied to the Mediation Board's letter of July 30th. Afterwards did you get a telegram from the board?

A. Yes, sir, I did.

Q. Will you read that telegram to the Court?

A. Telegram is dated August 16th, 1956, 10:53 a.m. It is addressed to H. L. White, Jr., President and General Manager, Norfolk Portsmouth Belt Line Railroad Company, Norfolk, Virginia. It reads as follows:

"Re this board Case E-28, Norfolk and Portsmouth Belt Line Railroad, BLE, BLF&E, and BRT on subject of establishment of point in Berkley Yard, Norfolk, as point for going on and off duty of certain yard crews, the organizations have notified this board that they are not agreeable to referring dispute to either First Division, National Railroad Adjustment Board, or special board of adjustment. The carrier's position is that any claims arising out of the proposed change, if and when made, should be progressed through National Railroad Adjustment Board, First Division. Under these circumstances you are hereby notified that the board mediation efforts in this dispute have been terminated and our file on this case has been closed as of this date by direction of the National Mediation Board. Joint White, Brown, Gilbert, Kennedy. Signed E. C. Thompson, Executive Secretary."

MR. WILLCOX: That is all.

MR. MacMILLAN: No other questions.

THE COURT: I think that telegram ought to come in if it is not already in.

MR. WILLCOX: If your Honor please, it is alleged in the complaint and admitted, I believe. But I wanted your Honor to have the benefit of it during argument.

THE COURT: That is perfectly all right. If it is in the pleadings; I haven't had an opportunity to go through them entirely.

MR. WILLCOX: It is quoted starting on page 9 of the complaint.

Your Honor please, may I speak to Mr. White?

THE COURT: Yes, He said he had something he might want to say.

All finished with Mr. White, gentlemen?

MR. WILLCOX: Yes.

THE COURT: Nothing further, gentlemen?

MR. MacMILLAN: Nothing further.

(After a brief recess, the Court heard arguments of counsel).

FILED
NOV 22 1957
JOHN T. FEY, Clerk

No. 622

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 7416

NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY,

Appellant

v.

BROTHERHOOD OF RAILROAD TRAINMEN, LODGE No. 514, ET AL.,

Appellees

BRIEF AND APPENDIX ON BEHALF OF THE APPELLANT

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MAY 13 1957

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Appellant

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Appellees

BRIEF ON BEHALF OF THE APPELLANT

This is an appeal from a judgment entered in the United States District Court for the Eastern District of Virginia, Norfolk Division, on February 8, 1957. By said judgment the District Court dissolved an injunction previously granted by the Circuit Court of the City of Norfolk, and subsequently extended as to time by said District Court.

THE CASE

The Norfolk and Portsmouth Belt Line Railroad Company, appellant, was the plaintiff in the suit. Hereafter it will be referred to as Belt Line or as the plaintiff.

Confronted on the afternoon of September 24, 1956, with notice of a general strike to become effective on September 26, 1956, the Belt Line filed its suit in the Circuit Court of the City of Norfolk seeking a temporary, and later a permanent, injunction against said strike.

The defendants named therein were the Brotherhood of Railroad Trainmen, Lodge No. 514, a voluntary association, Foy K. Vaughan, individually and as Local Chairman of such Brotherhood, the Brotherhood of Locomotive Engineers, Lodge No. 331, the Brotherhood of Locomotive Firemen and Enginemen, Lodge No. 76, and C. W. Mathews, individually and as General Chairman of the two Brotherhoods last mentioned.

The Brotherhood of Locomotive Engineers, Lodge No. 331, had, for some time prior to the institution of the suit, represented most of the engineers employed by the Belt Line. At or about the time that the suit was filed, the Brotherhood of Locomotive Firemen and Enginemen, Lodge No. 76, became the representative of all the engineers, locomotive firemen and hostlers employed by the Belt Line.

When that fact developed, the Court announced, with the consent of the Belt Line, that the case would be dismissed as to the Brotherhood of Locomotive Engineers, Lodge No. 331, and that was actually accomplished in the judgment from which this appeal is taken, but there is no complaint about that.

The remaining two Brotherhoods, Foy K. Vaughan, individually and in his capacity as Chairman of his Lodge, and C. W. Mathews, individually and as Chairman of his Lodge, will be referred to, collectively, as the defendants. Said organizations and said individuals are sued individually and in their respective capacities as the repre-

sentatives of all the employees of the Belt Line engaged in train service.

Some letters were signed by other individuals on behalf of the defendants, and reference to letters written to and from said individuals are treated herein as letters written to and from the defendants.

At the instance of the defendants, the case was removed to the District Court.

The defendants moved to modifiy the injunction prior to a hearing and before their answer was filed. When the answer was filed, the Belt Line moved to strike out and suppress portions thereof.

In lieu of passing on the motions, the District Court ordered a prompt trial on the merits and it never did pass specifically on either of the motions mentioned. They are no longer material.

After the hearing on the merits and while the Court had the matter under consideration, the Court entered another order extending the injunction, which was about to expire according to its terms, until a final decision in the case.

The Court delivered a written opinion, which, by its order, was adopted as findings of fact and conclusions of law. On February 8, 1957, it entered the final judgment dissolving the injunction.

Immediately thereafter the Belt Line gave notice of an appeal, executed and filed its appeal bond, and moved the Court to suspend the execution of its order pending an appeal.

Thereafter, on the same day, the Court entered another order suspending the execution of its final judg-

ment and continuing the injunction in effect pending the outcome of this appeal.

Both in its opinion and in the order last mentioned, the District Court recognized the disastrous consequences which would follow a general strike by the defendants.

CONTENTIONS OF THE BELT LINE

The Belt Line takes serious exceptions to the District Court's findings of fact and conclusions of law, particularly the following:

1. The District Court found as a fact that the dispute between the parties does not involve a construction of an existing rule arrived at by collective bargaining, does not constitute a minor grievance, and is not a matter of which the First Division of the National Railroad Adjustment Board has jurisdiction.

2. The District Court failed to take cognizance of the fact that the controversy has now been submitted to and is now pending before the First Division of said National Railroad Adjustment Board.

3. The District Court found as a fact that the dispute between the parties arises over a negotiation for a new rule or agreement covering new and changed working conditions and terms of pay, and that the defendants have complied with the Railway Labor Act's requirements concerning the initiation and conduct of negotiations for such purpose.

4. The District Court found that the Belt Line has waived all right to additional notice in accordance with said Act.

5. The District Court found as a fact that the defendants have exhausted all administrative remedies required or permitted by said Act, and that the grievance is a major grievance.

Said Court, acting on its findings of fact, concluded as a matter of law that there is pending between the parties a major dispute concerning which the Adjustment Board has no jurisdiction; that the defendants have discharged all obligations required of them by law prior to calling and conducting a general strike, and they are now entitled to strike as a means of enforcing their demands.

The Belt Line avers that the Court's findings of fact, especially in the respects hereinabove set out, are without evidence to support them and are directly contrary to all the evidence in the case, and that the Court should have concluded as a matter of law that the dispute is minor; that the controversy is one of which the Adjustment Board has jurisdiction; that the defendants have not exhausted their remedies under the Railway Labor Act and, therefore, that the strike is illegal; and, further, that because the matter is now actually pending before the Adjustment Board no strike can be legally called and conducted until that Board decides the matter.

In addition to that, the Belt Line avers that even if the evidence justifies the District Court's finding that the parties were really negotiating concerning the adoption of a new rule or agreement, the defendants have not exhausted the administrative procedures required by the Railway Labor Act.

A strike, even in the case of a major grievance, is illegal unless such administrative procedures have been followed.

APPENDICES

This brief is followed by two appendices designated Appendix 1 and Appendix 2, respectively.

Appendix 1 is the one required by Rule 10 of this Court. Appendix 2 includes the pertinent correspondence, in chronological order, which is printed as a basis for the statement of facts and for the argument which follow.

THE FACTS

The District Court, in its opinion, has made rather an elaborate statement of the facts in which, though inaccurate in the respects mentioned, it describes generally the activities of the Belt Line, the proceedings that led to the controversy now existing and the proceedings that followed the controversy.

In these circumstances, our statement of facts may be very short and may be limited to point out features not covered by Judge Hoffman, features in which we disagree with him, and some of the features he mentioned which are repeated only to the extent deemed necessary to present the matter adequately on brief.

The parties are all subject to the Railroad Labor Act. The Belt Line's operations are entirely yard operations and all take place in a single district. It has a single seniority list and similar rates of pay for all employees engaged in train service.

Some of its employees engaged in train service live in Portsmouth and vicinity. Some live in Norfolk and vicinity. Others live in that section of Norfolk known as Berkley and in South Norfolk and vicinity. That portion of Norfolk and all of South Norfolk and vicinity may be referred to as Berkley.

Travel between Berkley and Port Norfolk and between Norfolk and Port Norfolk requires the use of toll facilities. There are no tolls between Norfolk and Berkley. The distance from Berkley to Sewells Point is approximately ten miles. All employees going from Portsmouth to Sewells Point must pass through Berkley and all persons going from Norfolk to Portsmouth must pass through Berkley.

At the time of the trial of this case eight employees who live in Norfolk were reporting for duty at Port Norfolk. Eight who live in Portsmouth were reporting at Sewells Point.

A strike, or work stoppage, "would cause irreparable damage to the carrier and to the public. It would substantially paralyze industry in the area involved." So said the Court. (App. p. 44). The rules governing the points for reporting for duty and being relieved from duty were adopted as the result of collective bargaining, and although there are three separate rules, the material part of each is paragraph (b), and that is identical in all three rules. It reads as follows:

> "The point for going on and off duty will be governed by local conditions. In certain localities instructions will provide that engine crews will report at the hump, others report at yard office, others at engine houses, or ready tracks. It is not considered that the place to report will be confined to any definite number of feet, but the designation will indicate a definite and recognized location."

Anticipating the Belt Line's intention to move some of its crews from Port Norfolk to Berkley Yard, the defendants protested against the change for reasons set forth in their letters of November 25, 1955, and February 13, 1956. (App. p. 63 and p. 67).

On February 13, 1956, they submitted the matter to the Mediation Board, which declined to take jurisdiction.

On April 26, 1956, the Belt Line gave notice that six of its thirty-four crews would be transferred from Port Norfolk to Berkley, effective May 2, 1956.

The defendants announced a strike and the Mediation Board proffered its services.

Mediation proceedings followed and were extended over several months, without result.

The Mediation Board, realizing that the controversy was not one within its jurisdiction, urged the parties to refer the matter to the First Division of the National Railroad Adjustment Board. The Belt Line agreed; the defendants refused.

Thereupon the Mediation Board terminated its efforts, and on September 24, 1956, the Belt Line posted new notices calling for the removal of five instead of six of its crews from Port Norfolk to Berkley.

The defendants gave notice of a strike, to become effective on September 26, 1956, and on September 24, 1956, the Belt Line applied to the Circuit Court of the City of Norfolk for an injunction, and it was granted by said Court.

After the trial of the case and while the District Court had the matter under consideration, the Belt Line submitted the controversy to the Adjustment Board ex parte. It is still pending before that Board.

There may be some question about whether this fact can be considered by this Court on this appeal. That will be mentioned later, but attention is called to the statement of the District Judge on that point. (App. p. 53).

There will be further references to the facts and to features of the Court's opinion in the argument.

ARGUMENT

The First Division of the National Railroad Adjustment Board has jurisdiction over disputes involving train and yard service employees of carriers, that is, engineers, firemen, hostlers and outside hostler helpers, conductors, trainmen and yard service employees. 45 U. S. C. A. 153(h).

Disputes between a carrier and its employees growing out of grievances or out of the interpretation or application of agreement concerning rates of pay, rules or working conditions are to be handled in the usual manner, up to and including the chief operating officer of the carrier. If there is no agreement as a result of such handling, the matter may be referred by the parties, or either of them, to the Adjustment Board. 45 U. S. C. A. 153(i). Decisions of said Board are binding.

Major disputes, which include disagreements arising from attempts to negotiate an agreement or contract, must be handled on the property, but in the event of the failure to reach an agreement they must be referred to the National Mediation Board.

The jurisdiction of the two is different. The Adjustment Board can decide the controversy. The Mediation Board can only attempt to bring the parties into agreement.

Following the procedure set forth in the Railway Labor Act is compulsory. *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711, 722; *Chicago River & Indiana R. R. Co.* v. *Brotherhood of Rrd. Trainmen, et al.*, (7th Cir.) 229 F. (2) 926; *Brotherhood of Rrd. Trainmen, et al.* v. *Chicago River & Indiana R. R. Co.*, _____U. S._____ decided March 25, 1957, and not reported.

In matters referable to the First Division of the Adjustment Board its primary jurisdiction is exclusive. *Alabaugh, et. al.* v. *B. & O. Ry. Co.* (4th Cir.) 222 F. (2) 861; *Sampsell* v. *B. & O. Ry. Co.* (4th Cir.) 235 F. (2) 569, and cases mentioned above.

In the Chicago River case, supra, the Supreme Court affirmed the Seventh Circuit Court of Appeals, which had enjoined a strike by the employees of the carrier over minor grievances. The controversy had been submitted to the Adjustment Board but had not been decided.

The Supreme Court said in the opening paragraph of its opinion:

> "* * *. The ultimate question is whether a railway labor organization can resort to a strike over matters pending before the Adjustment Board."

Therefore, its opinion is unquestioned authority for the proposition that there can be no strike in such circumstances.

It is not clear from that opinion that a strike cannot be enjoined unless the matter is pending before the Board.

The same Court, however, made that perfectly clear in a two sentence opinion rendered on April 8, 1957, and not yet reported. *Manion* v. *Kansas City Terminal Rwy. Co.*, _____U. S._____.

That involved an appeal from a judgment of the Kansas City Court of Appeals enjoining a strike over minor grievances in a case which had not been submitted to the Adjustment Board. The Supreme Court, in its opinion, stated in the first sentence:

> "Judgment of the Kansas City, Missouri, Court of Appeals must be vacated in the light of our decis-

ion in *Brotherhood of Railroad Trainmen* v. *Chicago River and Indiana R. Co.*, No. 313, October Term, 1956, decided March 25, 1957, *because the dispute here is not pending before the National Railroad Adjustment Board.* * * *" (Italics supplied).

This makes it necessary to determine whether or not the fact that the controversy involved in the case at bar has been submitted to the Adjustment Board is officially in the record.

In paragraph 42 (Amended) of the complaint, the Belt Line specifically alleged that it had no grievance or complaint and, therefore, nothing to submit to the National Railroad Adjustment Board until the employees refused to comply with its order and definitely notified it of their intention to strike.

It set forth further that the time between the receipt of the strike notice on September 24, 1956, and the effective date of the strike, which was September 26, 1956, was so short that it was impossible to submit the matter to the Adjustment Board.

It alleged further that it intended to submit the matter to said Board at the earliest possible date.

Thereafter it became necessary to apply to the District Court to extend the injunction pending a decision of the case, because said injunction, by its terms was temporary and was about to expire.

At the same time said motion was made, the Court was advised that the matter had been submitted to the Board and counsel offered to file a copy of the submission. The Court remarked that such was unnecessary.

There was no reporter present and the foregoing matters do not appear in the record, but Judge Hoffman

mentioned the matter in his opinion (App. p. 53), where he said:

> "* * *. While the carrier had not submitted the matter in controversy to the Adjustment Board as of the date of the injunction, the Court has been verbally advised that, since the time of argument, the carrier has presented something to this Board, the details of which are not material to a determination of the carrier's right to an injunction."

In view of this statement in the Court's opinion, we feel justified in outlining the facts mentioned above, although there is no official transcript thereof.

In these circumstances, if this Court considers that fact properly before it, then, following the Chicago River case, the judgment should be reversed and the strike should be enjoined.

If this Court does not consider that matter properly before it, then its decision will not dispose of the case and the Railroad Company will be free to have the question litigated again, either in a separate suit or in further proceedings in this case, upon remand. It should be finally litigated in this action.

In *Texarkana* v. *Arkansas Gas Co.*, 306 U. S. 188, 203, the Supreme Court had occasion to deal with a situation somewhat analogous. There had been a change in circumstances since the decision in the District Court, but the right which enured to the appellant by reason of such change had not come into effect when the supplemental petition had been filed. Therefore, the Supreme Court held that the petition was premature as to so much of the relief as was based upon the changed circumstances. It said, however:

> "*The present action is an appropriate proceeding for the settlement of the entire rate controversy and the refund of such sums as may be determined, ultimately, to be due the Texas consumers.* Where there is a good cause of action stated in the original bill, a supplemental bill setting up facts subsequently occurring which justify other or further relief is proper. *If the original decree in the trial court had not been entered, this supplemental petition would simplify the controversy. We think this procedure is equally applicable after remand for further proceedings.*" (Italics supplied).

In *Manion*, supra, the Supreme Court was even more specific.

Having vacated the judgment of the Court below in the first sentence of its opinion, it said in the second and final sentence thereof:

> "* * *. *The cause is remanded for further proceedings not inconsistent with this decision and without prejudice to the power of the Court of Appeals to reinstate its judgment if the dispute is submitted to the Adjustment Board by either party within a reasonable time.*" (Italics supplied).

In the light of these authorities, we submit that if this Court should feel obliged to decide this case without considering that the matter is pending before the Adjustment Board, it should remand the case, with leave to the Belt Line to supplement its complaint by alleging the submission of the matter to the Adjustment Board and supplement its evidence by proving such submission, in order that the District Court may then pass upon the matter with the fact of submission in the record.

This brings us to the remaining feature of the case, namely: Was the controversy between the parties one in-

volving an interpretation of the rules, or a minior controversy subject to the jurisdiction of the Adjustment Board, or was it a major dispute arising over efforts to negotiate a new agreement, as found by the District Court?

If this Court holds that it was such a major dispute, then there is a further question, and that is whether or not the defendants have done all required of them by the Railway Labor Act as a condition precedent to a strike.

For his finding of fact, Judge Hoffman relied solely on the testimony offered at the trial by the witnesses Hayes and Mathews, which, in substance, was that the defendants conceded the right of the Belt Line to make the change in its operations, had never questioned that right, and that the negotiations had been concerned with the hardships incident to moving five crews from Port Norfolk to Berkley Yard. Those statements of the witnesses are contradicted beyond the peradventure of a doubt by their written protests, by their pleadings and by their actions. They are also contradicted twice by the actions of the Mediation Board, which declined to take jurisdiction of the matter when first submitted to it, but did proffer its services after the notice of strike.

After proffering its services, however, and after failing to bring the parties together, it wrote to the parties under date of July 30, 1956, and in its letter, it said:

> " 'The Board directs the attention of the parties to the provisions of Section 3 of the Railway Labor Act, under which the National Railroad Adjustment Board was created with full authority to hear and decide on all disputes between carriers and employees growing out of grievances or interpretations or application of agreements concerning rates of pay, rules or working conditions.

> " 'The National Mediation Board urges the parties to this dispute to either avail themselves promptly of the adjustment machinery of the Adjustment Board or to create, by agreement, a special or system board of adjustment under the provisions of Section 3. Second of the Act, to consider and decide upon the differences between them." (App. pp. 72 and 73).

If the controversy was of the nature described by the witnesses in their verbal testimony, then the Mediation Board would have jurisdiction of the matter and further procedure was necessary, as will be pointed out hereafter.

The facts of the case, save as to the testimony mentioned, are shown in the written record and are not disputed. They are substantially similar to the facts in the case of *N. Y. Central R. R. Co.* v. *Brotherhood of Rail. Train.*, D. C. Ohio, 140 F. Supp. 273, in which the District Court held that the disputes involved were minor and involved questions properly cognizable by the Adjustment Board, and enjoined the strike.

The only difference in the facts is that in the New York Central case the Railroad Company transferred all its activity from one terminal to another, whereas in the case at bar the Belt Line transferred only five crews out of thirty-four.

The New York Central matter was first brought to the attention of the Mediation Board by a telegram identical in substance with the telegram sent that Board in this case, which will be mentioned hereafter, and the District Court called specific attention to the fact that no request was made in the application for a change in any existing working condition or for a new or supplemental agreement.

The Mediation Board declined to take jurisdiction until after the notice of the strike was given, and in that case also, it decided that the matter should be referred to the Adjustment Board and so advised the parties.

Coming back to the facts, we call attention to the correspondence and telegrams, to which we have added emphasis. The first communication on the subject between the parties was a letter from the defendants to the Belt Line dated November 25, 1955, (App. p. 63), in which they said:

1. It is the employees' position that Port Norfolk and Sewells Point have become firmly established as the two points where the Belt Line crews "*can be required to report for and be relieved from duty.*" (Italics supplied).

2. Any change in the present arrangement whereby the crews report and are relieved at Sewells Point will have to be made "*either by mutual consent or in accordance with the provisions of the Railway Labor Act, as amended.*"

That letter was written before the Belt Line had acquired a single Diesel locomotive.

On February 10, 1956, the President of the Belt Line conferred with representatives of the defendants in the President's office and delivered to them a written communication of that date. (App. p. 74). In that letter the President quoted the applicable rule and stated unequivocally that the Belt Line had the right to make the change under the existing agreement and that there were absolutely no restrictions on its right to do so and no requirement that such changes must be made either by mutual consent or in accordance with the Railway Labor Act. We quote two paragraphs of that letter:

" 'In view of the articles referred to above, *there is no restriction placed on this company which prevents*

it from establishing additional reporting and relief points for its crews, nor is there any requirement that if these points are established this must be done by either mutual consent or in accordance with the Railway Labor Act, as amended.

"'The articles referred to above are very specific in language and were intended for the purpose of permitting the company to change or add to the number of points at which its crews are to report and be relieved from duty, governed by local conditions.'" (Italics supplied). (App. p. 67).

The issue was made and the subject of controversy was clearly stated. The Belt Line contended that it had a right to make the change without the consent, without notice and without negotiation. The defendants specifically claimed that the change could not be made without their consent or as a result of negotiations under Section 6 of the Act.

If there were any doubt about the issue, all doubt was removed in the defendants' reply to that letter dated February 13, 1956, (App. pp. 66 and 67) in which they said, inter alia:

"'We doubtless erred in our previous letter when we referred to the contemplated change as simply a change in the *point* where crews are to report and be relieved. We should have called your attention to the fact that the change will amount to a *change* in *both the point and the locality at which these crews have traditionally reported and been relieved.*

"'A careful reading of the rules you have referred to, reveals that they refer to "*points*," ie, definite positions, and "*localities*," ie, areas or regions. We concede that the Company has a right under these rules to designate the point *within the area or region of Port Norfolk or Sewells Point Yards* where the em-

ployees we represent will be required to report and be relieved, so long as such designation does not work a hardship upon them, or result in a hazardous situation. *We deny, however, that the company has the right under these or any other rules to require these men to report and be relieved at Berkley Yard—a new locality far removed from Port Norfolk and Sewells Point, and of difficult access to the employees—without the benefit of agreements negotiated in accordance with the terms of the Railway Labor Act.* * * *." (Italics supplied.)

There were no other communications between the parties prior to the mediation proceedings.

On February 13, 1956, the defendants sent the Mediation Board the following telegram:

" 'Serious situation existing on Norfolk Portsmouth Belt Line Road as the result of management *arbitrarily moving the terminal from Port Norfolk to Berkley*, a distance of approximately six miles, without negotiating with committees. Request your board take immediate jurisdiction and notify carrier to hold matter status quo pending mediation proceedings. Letter follows.'" (App. p. 39). (Italics supplied).

It should be noted by this Court, as it was by the District Court in the New York Central case, that there was no request for a change in any existing working agreement or for a new or supplemental agreement.

The Board, after advising the Belt Line of the telegram and receiving its version of the facts, considered the matter in executive session and determined that there was nothing which justified it in assuming jurisdiction. It so advised the parties in writing.

After the first strike notice was given on April 26, 1956, the Mediation Board proffered its services and there

were extended meetings and conferences, some in Norfolk under the jurisdiction of a mediator and one in Washington, D. C. under the direction of a member of the Mediation Board.

The details of the negotiations are not in evidence. They were expressly excluded from evidence by the ruling of the Court. Notwithstanding that fact the District Court found:

> "* * * it is abundantly clear that the general subject of discussion was the travel time and expense involved by reason of the proposed change. Whatever may have been the original intent of the Brotherhoods to insist that the change in reporting place could not be effected without their consent, this contention, if ever proposed, was quickly abandoned. * * *" (App. 1. 51).

How those facts could appear when they are not mentioned in the correspondence and the evidence was excluded is beyond us, and we respectfully submit that such a finding was directly contrary to the evidence.

During the mediation proceedings there were certain proposals made, first by one side and then by the other. Most of these were conveyed to the respective parties by the mediator or by the member of the Mediation Board. For details of the procedure, see testimony of Hayes. (App. p. 37). There were also several conferences among the parties but no settlement was reached.

After the Mediation Board terminated its activities in the matter, there was a single communication between the parties, namely, written notice from the defendants to the Belt Line on September 24, 1956, that the strike would commence on September 26, 1956.

We come now to the pleadings and we refer to paragraph 21 of the complaint. There we set forth that the defendants contended that the Belt Line had no right to make the contemplated change for two reasons: First, because Port Norfolk had been used for many years and that the Belt Line had no right to change it except by agreement with the defendants. Second, that the rules upon which the Belt Line relies for its authority to make the change, (ante, p. 7) really prohibit such a change except by consent.

If, as Hayes and Mathews testified, the defendants conceded the Belt Line's right to make the change, all they had to do was to say so, and the answer to that particular paragraph was an appropriate place in which to so state. They did not do so. In paragraph 13 of their answer they asserted that there were no allegations of fact in paragraph 21; that the plaintiff was only speculating as to the contentions of the defendants and that there was nothing requiring any answer, but by way of further answer, they asserted that the plaintiff has inaccurately stated their repeatedly announced position, which was set forth in paragraphs 6 and 10 of their answer.

Turning to paragraph 6, we find that the defendants again referred to the establishment of their homes (only some employees have established such homes) in Portsmouth, and then said that under the contract the Belt Line had the right to make changes in the points of going on and off duty *within the locations of Port Norfolk and Sewells Point*, but that the contract was silent on the right of the Belt Line to change the place or locality of reporting, and further, that such a change was a change in working conditions, which required notice pursuant to

Section 6 of the Act and negotiations. In other words, it required their consent.

The position taken in paragraph 6 is strikingly similar to that set forth in the defendants' letter of February 13, (ante pp. 16 and 17).

In paragraph 10, the defendants admit the right of the Belt Line to make all reasonable changes necessary for its operation *consistent with its contract with defendants and consistent with the provisions of the Railway Labor Act.* a reaffirmation of what is set forth in paragraph 6.

In paragraph 34 of the complaint the Belt Line alleged that the defendants should comply with the change orders (which cannot be disputed if they admit the right to make the change) and then, without interrupting commerce, process their claims.

We set forth three specific methods, any one of which could have been followed:

1st: They could file a complaint alleging violation of the collective bargaining agreement by changing the point for going on and off duty.

2nd: They could claim that the employees living in Portsmouth who might be required to go on and off duty at Berkley were entitled to compensation for the time spent in travel from Port Norfolk to Berkley and return and to reimbursement for the expenses incurred in such travel.

3rd: *That the defendants could request the Belt Line to agree to a new rule to provide for the payment of compensation to such parties because of the time and expense involved in traveling from Port Norfolk to Berkley for the performance of their duties and in returning.*

In paragraph 35 the Belt Line stated that if the defendents followed any of the methods suggested that negotiations would follow, and if unsatisfactory as to the first and second, could be taken to the Adjustment Board, and if unsatisfactory as to the third method, could be taken to the Mediation Board.

By suggesting the third method the Belt Line *expressly and clearly invited the defendants to initiate proceedings looking to the negotiating of a new rule or contract to provide for such compensation, and if that was what they were trying to do they had full opportunity to say so and to demonstrate it by their actions, namely, by giving notice under Section 6 of the Act and opening negotiations.*

Again they failed.

In paragraph 25 of their answer they *specifically denied the allegations in paragraph 34 of the complaint and specifically stated that they were not required to adopt or follow the procedure outlined in paragraph 34.* In said paragraph of said answer they did state that the issue involved was not covered by the existing contract, *but they do not explain why they refused to request the adoption of a new rule or a new agreement.*

So much for the words of the parties on the subject. Now we come to their actions.

If, in truth and in fact, they had admitted, prior to the trial, the right of the Belt Line to make the change under the existing contract and had admitted that the existing rule does not entitle them to any compensation by reason of such change, then they were in duty bound to comply with such change and to go to work at Berkley Yard.

There could be no hardships until they actually went to work there, and only by going to work could there be a determination that hardships were created.

It is by no means certain that there would have been any hardships.

It is certainly fair to assume that, had there been no action by the Brotherhoods to prevent the change, all residents of the Portsmouth area who were reporting at Sewells Point would have elected to report at Berkley Yard, thus saving themselves the expense and time involved in ten miles additional travel. Also, that all men living in the Norfolk area and reporting at Port Norfolk would have elected to report at Berkley Yard, thus saving themselves the expense and time from four and one-half to six miles travel and bridge toll or tunnel toll, and that all employees living in Norfolk at points nearer to Berkley Yard than to Sewells Point would have elected to report at Berkley Yard instead of at Sewells Point, thus saving themselves the expense and time involved in traveling a greater distance.

It might well have turned out that not a single resident of Portsmouth area would have to go to Berkley and all who reported there would have benefited rather than been hurt.

What do they claim was negotiated?

They say that they *negotiated hardships* or that they wanted to *negotiate hardships.*

Hardships may indicate the necessity or the desirability of negotiations looking to a relief or elimination of such hardships, but you can't "*negotiate hardships.*"

All negotiations in such matters result from a desire of the railroad involved or of the employees to do some-

thing *not permitted under existing rules and under agreements already negotiated.* Such party or parties may desire to change working conditions from those authorized or prescribed by the existing rules to others considered more favorable to the moving party. Employees might want to change working conditions, and what more frequently happens, the employees might think they are entitled to additional compensation for services being rendered. *In any of those cases the party or the parties desiring the change in conditions or the parties desiring increase in compensation must initiate the proceeding by making a request or a demand for such changes. Only thus can negotiations be initiated, and when initiated, the moving party must give the other party notice under Section 6 and request negotiations.*

In this case, there is absolutely not a word of evidence in the correspondence, the telegram, the pleadings or the testimony that the defendants have ever asked for or demanded any additional compensation. They have said, in substance, "You can't make this change without our consent or without agreeing to the changes in negotiations initiated in accordance with Section 6 of the Act." They have stopped right there and apparently thought there was some duty on the Belt Line to initiate negotiations for the increase in their compensation. This is a strange position, *especially in view of their present statement that the Belt Line had the right to make the change.*

If there had been negotiations for a new rule or a new agreement and such negotiations had failed, the Mediation Board would undoubtedly have jurisdiction, but it has twice denied its jurisdiction; once in refusing to docket the matter after considering it in executive session, following the receipt of defendants' telegram of February 13, 1956, and again in advising of the failing of negotiations in

their letter of July 30, 1956, wherein they called attention to the creation of the Adjustment Board "*with full authority to hear and decide on all disputes between carriers and employees growing out of grievances or interpretations or application of agreements concerning rates of pay, rules or working conditions.* (App. p. 72). (Italics supplied).

Negotiations of the kind mentioned must be initiated by notice in accordance with Section 6 of the Act. The District Court specifically found that such notice had not been given in this case, but, in effect, that it had been waived. (App. pp. 55 and 56). He relies on *McMullans v. Kansas, etc. Rwy. Co.*, (10 Cir.) 229 F. (2) 50. In the first place, we assert that there was no express waiver and there can be no waiver of a notice by implication, unless the party against whom such waiver is alleged has some information concerning the subject of negotiations.

Here the matter was not brought to its attention at all.

We also assert that the case cited does not even deal with a similar question. In that case, the material facts were as follows:

The B.L.F. & E. had been designated as the bargaining agent of the engineers, firemen and hostlers employed by the carrier. The agreement arrived at in negotiations with that organization provided that engineers should be retired upon attaining the age of seventy years.

The plaintiffs had reached that age and they objected to retirement. One of the plaintiffs was a member of the B.L.F. & E. and the other two were members of the B.L.E. They sought to enjoin the enforcement of that provision of the agreement which made it compulsory for

them to retire, and relied, in part, upon their allegation that said agreement was invalid because no notice of the negotiation was given to them individually and no such notice was given to the B.L.E.

The Court held that negotiations with the duly certified bargaining agent were proper and that a contract arrived at through such negotiations was binding and that there was no requirement for notice to the plaintiffs. Nothing said by the Court waived or in any way relaxed the requirements of Section 6.

In spite of that evidence, including the lack of any notice or demand on the part of the defendants, the District Court in our case found that the controversy was over the effort of the defendants to negotiate a change in existing agreements covering rates of pay, rules and working conditions, specifically with respect to alleged hardships resulting from the change of the reporting and relief point for five crews. The Court said:

> "* * * It is apparent that a supplemental agreement covering these alleged hardships was sought by the Brotherhoods. * * *" (App. p. 55).

If we assume for the sake of argument that the District Court was right in its findings of fact, we aver that the defendants have not taken all the steps required of them by the Railway Labor Act.

As to major disputes, the Act requires the parties to submit to the successive procedures designed to induce agreement. *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711, 722.

After the failure of negotiations, the matter must be submitted to the Mediation Board. That was not done.

On February 13, 1956, the defendants referred the matter to the Mediation Board, but that was clearly in an effort to support their protest made to the Railroad Company at that time, and had nothing whatever to do with negotiations looking to a new contract.

Thereafter, the Board itself proffered its services under its emergency powers when a strike was threatened, but it is clear that the Board did not consider that as a submission of the major dispute. If it had done so, it would have been obliged to carry out all of the provisions of the Act, including Sections 5 and 10, (45 U. S. C. A. Sections 155 and 160). The final action required of the Mediation Board has not been taken under those sections.

Paragraph First of Section 5 says that if the efforts of the Board to bring about a settlement are unsuccessful that said Board "*shall at once endeavor as its final required action* (except as provided in paragraph third of this section and in Section 160 of this title) *to induce the parties to submit their controversy to arbitration* * * *." That has not been done.

Section 10 provides that if in the judgment of the Board the dispute threatens to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Until such final action is taken under those two sections, the proposed new agreement may not be made lawfully by either party and the defendants are not permitted to strike to require the change sought by them.

The failure to carry through such procedure deprives the President of any power to appoint an Emergency Board and

if such a Board were appointed the results obtained as a result of such intervention might be very different from the results achieved by the parties. Thus the public is deprived of one of the remedial procedures prescribed by the Railway Labor Act. Elgin, J. & E. R. Co. v. *Burley*, supra; *Virginian Ry.* v. *System*, 300 U. S. 515; *Graham* v. *B.L.F. & E.*, 338 U. S. 232.

With reference to arbitration, the District Court, in its opinion, (App. p. 52) says the record does not indicate that either party offered to arbitrate the matter, and (App. p. 59) he stated that neither party has requested arbitration and that the carrier has not exhausted its efforts to arbitrate the matter voluntarily. Apparently the Court was of the opinion that such failure was fatal to the Belt Line's case.

The Act does not require either party to suggest arbitration. It requires the Mediation Board, in the case of major disputes, to suggest it. However, in this case, the evidence disposes of that matter.

Hayes testified that the defendants had stated to the mediator that they were willing to arbitrate the issue, but stated very frankly that he did not know whether or not the mediator conveyed that information to the Belt Line.

On the other hand, White, of the Belt Line, testified, without contradiction:

> "We have not offered to arbitrate at any time. We have not been asked by the defendants to arbitrate. *There is no record in our entire proceedings where that question was put to us by the defendants or the National Mediation Board.*" (App. p. 18).

and further, that while the Board had jurisdiction of the matter there was never, at any time, any offer of arbitra-

tion made to him through the mediator from the defendants. (App. p. 19).

Finally, when asked whether the mediator communicated to him any offer from the defendants to arbitrate, he said:

> "*He did not. He consistently said they would not arbitrate; that they would not go to the mediation—I mean to the Adjustment Board or would not consider a special system board of adjustment.* * * *." (App. p. 26).

In 45 U. S. C. A. 157, it is expressly stated:

> "That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter or otherwise."

The District Court, in concluding that the controversy in this case should not go to the Adjustment Board, relied, in part, on the statement of counsel for the defendants that the time required for processing such matters frequently runs to four or five years, and, in part, on the rulings of that Board in several cases that the subjects of the claims were matters for negotiation. (App. pp. 52 and 53). He referred to three particular awards.

If the matter is one within the jurisdiction of said Board, then the time required for obtaining a decision is immaterial and irrelevant. That cannot defeat the jurisdiction of the Board any more than the delay incident to a crowded docket of a Court can defeat the jurisdiction of the Court in a case properly before it.

That the Board in the case mentioned held that the controversies were matters for negotiation is equally irrelevant.

An examination of the records in those cases will

show that the actions of the Board were proper and that the facts are in nowise similar to those in the case at bar.

The important thing is that the Board in every case to which the Judge referred, including those cited in his opinion, *held that it had jurisdiction.*

The present controversy having been submitted to said Board and the plaintiff being entitled to an injunction under the Chicago River case, supra, the actions of said Board in past cases are not of much assistance.

However, inasmuch as the Court referred to three specific cases, we would like for this Court to have the benefit of the facts, in order that it may evaluate the decisions.

Award No. 10603, Docket No. 15422. This involved a protest by the trainmen of the Central R. R. Co. of New Jersey against changing the designated point for going on and off duty from Elizabeth Port to the Standard Oil Plant at Bayway, New Jersey, a claim for two hours additional pay, a claim for reimbursement for expenses in getting to the new point, and a request that proper transportation be furnished by the Railroad Company.

The Railroad Company claimed that it had the right to make the change and that making the change did not entitle the trainmen to the benefits claimed by them; that such claims could arise only in negotiations for a new contract and that such negotiations were not subject to the Adjustment Board.

The Board held that the matter came before it on the question of the reasonableness of the designated points for going on and off duty, *the determination of which was a matter for negotiation.*

In other words, the effect of the decision is that the Railroad Company had a right to make the change; that making such change did not give rise to any claim, and

that the trainmen, if dissatisfied, must initiate negotiations in accordance with Section 6 of the Act.

Award No. 12035, Docket No. 15683. In this case, the Brotherhoods made a claim against the B. & O. R. R. Company for transportation for yard crews which, at that time, were being required to report for duty and to be relieved at Brooks Avenue instead of Lincoln Park, or that such crews be permitted to commence work and be relieved at Lincoln Park as theretofore.

The rule involved was similar to the rule in our case. Again the Board held, in effect, that under the rule the Railroad Company was within its right in making the change; that such gave no rise to these claims and, as in the other case, such matters were proper subjects for negotiation.

Award No. 14941, Docket No. 23829. This case appears to be in point. It involved the claim of an engineer named Rutherford and other employees for through freight rate of pay instead of yard engine rate allowed, and *a claim of compensation for thirty minutes used in going to work and thirty minutes coming from work on account of arbitrarily fixing a designated point of tie up without conference or agreement.*

Again, as in the other two cases, the Board denied the claim which, in effect, held that under the existing rule the Railroad Company had the right to make the change without any conference or consultation with the employees and that such did not entitle them to additional compensation. The Board also said that the request for additional compensation was a matter for negotiation.

Many other cases might be cited, but in the interest of time we will refer only to two.

Award No. 11460, Docket No. 12082. This involved a protest by employees of the Houston Belt & Terminal Ry. Company against the change of reporting point and claims for compensation for additional time used by the employees in going to and from the new reporting point. The claims were denied and the Board, in discussing the rule, which is substantially similar to ours, said:

> "If it had been the purpose of Article 13 to require the designation of McKinney Avenue as the exclusive place for crews to report on and off duty, suitable language to effect that purpose could have been employed.
>
> "The only exactions that Article imposes upon Carrier is that a place be designated; that it be adequate to keep lanterns, rain clothes and lunches of all regular crews, and that such crew be provided with a separate locker. Those requirements have been met."

Award No. 14260, Docket 22676. In this case the claim of the employees was sustained. The facts were not the same as ours. The employees in question, while required to report and be relieved at a given point, were, on the occasions giving rise to the claim, actually relieved at a point different from that at which they went on duty, having been ordered upon return to the original point to take the engine to another place. The Court properly held that the employees were entitled to compensation.

Various other cases were called to the attention of the District Court but it would unduly lengthen this brief to refer to all of them.

Again we call attention to the similarity between this case and New York Central, supra. The contentions between the parties in that case were almost identical in

principal with those in the case at bar, and the position of the railroad employees is well illustrated by the colloquy between counsel for the Brotherhoods in that case and the District Judge, appearing on pages 278 and 279 of 140 F. Supp. Counsel for the Brotherhood stated:

> "It is our position, Your Honor, that as to the authority of the railroad management to effect a physical change, namely, the closing of this yard, that this is a subject which the Brotherhoods have a legal right to negotiate with the management about, aside from these other questions."

Then said the Court:

> "If your theory would prevail here, then any time any railroad would want to make a change in its physical set-up and operation its directors would be required to sit down with the Brotherhoods, and come to an agreement on the propriety of that change; is that the position you are taking?"

The reply from counsel was: "Yes, Your Honor."

Confronted with overwhelming authority, the defendants at the trial realized that their position taken by them in their correspondence and in their pleadings could not be sustained. Then they undertook to "change horses" and to rely on their belated contention that they had never questioned the right of the railroad to make a change but had asked the railroad to negotiate concerning a new contract for additional compensation, without questioning the right of the railroad to make the change.

They had a perfect right to give notice of a desire for such a change in the agreement or for a new agreement and to require the Belt Line to negotiate with them, but such requests and such negotiations should have been separate and apart from their denial of the Belt Line to

make the change. To state the matter plainly, they should have accepted the invitation of the Belt Line to initiate such negotiations as set forth in paragraph 34 of the complaint.

CONCLUSION

On behalf of the Norfolk and Portsmouth Belt Line Railroad Company, we submit that:

1. The overwheliming weight of the testimony shows that the defendants contended from the beginning until the actual day of the trial that the Belt Line had no right to change the reporting place of crews from Port Norfolk to Berkley Yard except by mutual consent or as a result of negotiations. Obviously, doing it as a result of negotiations made the consent of the defendants essential. In support of this and in addition to what has been heretofore said, we call attention to one question put to the witness Hayes after he testified that the Railroad Company had the right to make the change and the answer to that question. (App. p. 36).

> "Q. And you contend and the Brotherhoods contends that as a condition precedent to exercising that right they must negotiate an agreement with the Brotherhoods providing for what you call the hardships, that is, the time consumed and the expenses; that is correct, isn't it?"
>
> "A. I didn't say that was absolutely necessary. I don't think, Mr. Willcox, I said that was our purpose in trying to negotiate an agreement to cover those hardships. That is what we were protesting, the fact that it hadn't been done."

2. In spite of the spoken testimony of the witnesses Hayes and Mathews, which is contradicted by the cor-

respondence, the pleadings and the actions of the defendants, the true issue was whether or not, under the existing rule, the Belt Line had a right to require some of its crews to report at Berkley Yard rather than at Port Norfolk without the consent of the defendants, and the determination of that issue is solely and exclusively within the jurisdiction of the First Division of the Adjustment Board.

3. Never, at any time, have the defendants notified the Belt Line, expressly or impliedly, of a desire to negotiate a new rule or agreement independent of their denial of the Belt Line's right to make the change.

4. The issue has been submitted to the Adjustment Board and is now pending before it.

Therefore, the judgment of the District Court should be reversed and the strike should be permanently enjoined.

Respectfully submitted,

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ROBERT THOMAS BOWEN, SWORN (Tr. P. 52)

DIRECTION EXAMINATION BY MR. WILLCOX:

Q. What is your name, sir?

A. Robert Thomas Bowen.

Q. And you are assistant to the chief engineer of the Norfolk and Portsmouth Belt Line Railroad Company, are you not?

A. Yes, sir.

Q. Explain to the Court—I assume the Court already knows it but I want it for the record—the routes available for transportation between Port Norfolk, the yard of the Belt Line known as Port Norfolk, and the yard of the Belt Line known as Berkley Yard, and give the distances.

A. Well, I will have to refer to my notes. At the time that I took them, on March 6th, I made a trip from the Port Norfolk yard office through the tunnel to the Berkley yard office, which was a distance of four and one-half miles.

THE COURT: That is by automobile?

THE WITNESS: Yes, sir, that is by automobile.

Q. That is measured by automobile speedometer?

A. That is right, yes, sir. And then in return I made the trip by the Jordan Bridge from the Berkley Yard office to the Port Norfolk Yard office, which was six and one-tenths miles. And then on July 18th I made a trip from the Port Norfolk Yard office by way of the free toll route by Smith-Douglass, which was a distance of twelve and three-tenths miles.

Q. The last route that you mentioned is the only one which can be followed that involves no tolls?

A. That is right, yes, sir.

Q. Do you know what the toll is on the bridge, the second route that you described?

A. On the Jordan Bridge, I don't know if there are any reduced rates if you buy a book of tickets or not, but round-trip is 35 cents for car and driver.

Q. Extra for the additional passengers?

A. That is right; five cents extra for an additional passenger.

Q. That is round-trip?

A. That is right; 35 cents round-trip, car and driver, plus 5 cents for each additional passenger.

Q. What is the tunnel fare?

A. The tunnel fare is 30 cents one way for car and driver.

Q. And 5 cents additional each passenger?

A. That is right, yes, sir.

HARRY L. WHITE, JR., SWORN (Tr. P. 55)

DIRECT EXAMINATION BY MR. WILLCOX:

Q. State your name and occupation.

A. Harry L. White, Jr.; president and general manager of Norfolk and Portsmouth Belt Line Railroad Company.

Q. Mr. White, have the defendants or any of them submitted to the Belt Line any claims or complained of any grievances they may have in regard to this change in operations save as to their contention that we cannot make the change except as a result of negotiations with them?

A. No, sir.

Q. Has any representative or representatives of the Belt Line conferred with the employees and the representatives of the Brotherhood on this subject?

A. Yes, sir.

Q. On how many different occasions, do you know?

A. I should say at least, including those conferences with the mediator, four; three conferences with the mediator and a private conference in my office at my request.

Q. Those conferences take place in Norfolk?

A. Those did, and in addition to that we had a meeting in Washington on the 23rd of July with the Mediation Board.

Q. During those conferences did you or did you not give consideration to every proposal made or suggested on behalf of the Brotherhoods and their members?

A. I did.

Q. Did you ever refuse to negotiate with them at any time on any subject?

A. Up until the time I received their letter of February 13th, I believe it was, we had no negotiations.

Q. But I am talking about after that. There had been no negotiations. But during the time the matter was in the hands of the Mediation Board and we were having these conferences, did you or not discuss and confer on this subject at all times when you were requested to do so?

A. Yes, sir, but I never had a request to discuss it.

Q. Where did your request come from?

A. Through the Mediation Board.

MR. WILLCOX: Now, I will have to anticipate the answer of what is coming, your Honor, if I may, in regard to the answer.

Q. Has anybody at any time ever submitted to the Belt Line directly or indirectly an offer to arbitrate the controversy?

A. No, sir.

Q. Have you with you the letter received from the Mediation Board, the final letter before it terminated its efforts?

A. Yes, sir.

Q. Will you produce that, please, and your reply also if you have it.

MR. MACMILLAN: Mr. Willcox, if it will save you time, I believe you set it out in your complaint and we will admit the letter as it appeared in the complaint is correct.

MR. WILLCOX: I did not set out the letter from the Mediation Board. I set out a portion of the reply.

If your Honor please, I offer in evidence a copy we have the original here of the letter of July 30th from the Mediation Board, which I would like to introduce.

THE COURT: Letter of July 30th, 1956, from Mediation Board to the Belt Line Railroad.

MR. WILLCOX: And to the Brotherhoods.

THE COURT: And to the Brotherhoods.

MR. WILLCOX: And ask that be marked as Complainant's exhibit.

THE COURT: Complainant's Exhibit No. 1.

(Received in evidence and marked Plaintiff's Exhibit No. 1.)

MR. WILLCOX: If your Honor please, I am not going to read the whole of this letter now but I would like to read part of it. After reciting what had taken place before the Board, they say this:

"In view of this action of the Carrier," —that was in declining to agree to a suggestion— "copies of the proposed agreement, executed by the organizations' representatives and now held in escrow by the undersigned, are being destroyed in accordance with Board Member Edwards' letter to Messrs. Turner, Mellett and Jenkins of July 24, 1956.

"*The Board directs the attention of the parties to the provisions of Section 3 of the Railway Labor Act, under which the National Railroad Adjustment Board was created with full authority to hear and decide on all disputes between carriers and employees growing out of grievances or interpretation or application of agreements concerning rates of pay, rules or working conditions.*

"*The National Mediation Board urges the parties to this dispute to either avail themselves promptly of the adjustment machinery of the Adjustment Board or to create, by agreement, a special or system board of adjustment under the provisions of Section 3, Second of the Act, to consider and decide upon the differences between them.*

"The National Mediation Board stands ready to render what further assistance may be necessary if

the parties agree to this procedure. A prompt reply is requested."

Q. Now, you replied to this letter, did you not, Mr. White?

A. Yes, sir.

Q. And in that letter you included the paragraphs, in response to the Board's suggestion, which are set forth in paragraph 26 of the complaint?

A. Yes, sir.

MR. WILLCOX: And I understand that is admitted?

MR. MACMILLAN: Yes.

THE COURT: The reply of Mr. White, then, appears in paragraph 26 of the complaint filed in this action.

MR. WILLCOX: The reply to that particular portion. It will be necessary, sir, to bring in the whole letter if your Honor hears evidence on the matters we asked to be stricken out today.

Q. Mr. White, in the negotiations up there

MR. MACMILLAN: Mr. Willcox, do I understand you are not going to introduce the letter you read from?

MR. WILLCOX: I understood you admit that. Not at this time.

MR. MACMILLAN: We ask that it be admitted and that the whole letter be read and not the portions of it.

MR. WILLCOX: If your Honor please, the only reason I object to it: I have moved to strike out certain portions of the answer in which they set forth proposals and counter-proposals, and this deals with those. Subject to that objection, I haven't the slightest objection in the world of introducing the whole letter. But I want it understood I am introducing it now only for the purpose of introducing the

reply to that suggestion. I still claim that it is inadmissible.

THE COURT: I understand. I will let Mr. MacMillan introduce it subject to your objection at the proper time.

MR. WILLCOX: He can do it now.

THE COURT: All right. Let it be marked as Defendant's Exhibit No. 1.

(Marked Defendant's Exhibit No. 1.)

MR. MACMILLAN: Your Honor, our position is, if you read from a part of the letter you have got to read the whole letter to get it in context. We don't object to Mr. Willcox putting in a part. We merely ask that it all be available to the Court.

THE COURT: It is all in now subject to the objection of Mr. Willcox to the part he has moved to strike out.

(Mr. Willcox then read letter marked Defendant's Exhibit No. 1).

MR. WILLCOX: Now, that letter was written to the Board in response to its letter. It does not appear here but copies were sent to the organization.

MR. MACMILLAN: We object to the admission of that as a self-serving statement on the part of complaintant.

MR. WILLCOX: He offered it, your Honor.

THE COURT: You asked for the whole letter, Mr. MacMillan.

MR. MACMILLAN: My understanding was that he sought to introduce a letter which is the letter of July 30th, 1956, written by the Mediation Board to Mr. White. That is the letter which I asked to be marked.

THE COURT: No. That was introduced before as Complainant's Exhibit No. 1. That is the one which Mr. Willcox told you was not in the complaint.

MR. MILLAN: This letter was not shown to me. I hadn't seen it until just now. We object to the admission of that on the grounds that it is not binding on these defendants.

THE COURT: We are going to let it in.

MR. MACMILLAN: We save our objection.

THE COURT: Certainly, if your contention is right that the other evidence comes in from the Mediation Board, the whole letters that Mr. Willcox is now objecting to, and I think that it is probably admissible for the purpose of showing the whole transaction, I am inclined to believe that it is admissible. Of course, this also deals with certain self-serving statements, but it is a matter of the permanent records of the Belt Line Railroad, is it not?

MR. MACMILLAN: Well, the evidence we offered was evidence which both parties had participated in before the board. This evidence is a letter between one party to the board, which was not received by the other party nor did the other party have any part.

THE COURT: Suppose the other party had re-received it, what could you do about it? You couldn't have stopped it in transit.

MR. MACMILLAN: No, as I say, we might have then been a party to it and we might have written a letter in reply to it raising some objection.

THE COURT: It may be self-serving. It may well be self-serving, but in order for me to have the history of what went on, I have got to have all the facts. That is why I am inclined to believe that ultimately I am going to rule against Mr. Willcox on certain of his motion to strike out paragraph 11.

MR. WILLCOX: If your Honor please, bear in mind I offered only the part quoted here and my friend insisted on it.

THE COURT: That is true. It has been marked as a Defendant's exhibit.

MR. WILLCOX: That is correct.

Mr. MacMillan, you have admitted paragraph 27. I take it that includes the telegram?

MR. MACMILLAN: That is correct.

Q. (By Mr. Willcox) Now, Mr. White, when jobs are open and bids are requested and no bids come, what is the procedure for filling the jobs?

A. Well, the junior man on the seniority roster is assigned to the job. I think Mr. Burrows, the superintendent, could probably give you more accurate detail of that particular question, if it's permissible; because he lives with it and he handles all those bulletins and routine matters dealing with the operation.

Q. During the months starting last November when you received the first letter from the Brotherhoods and down to the present, what complaint have the men made and how many complaints have they made about this change? I don't mean how many times they have made the same complaints, but have they ever made any complaint except they had to be negotiated with?

A. No, sir.

Q. What is a method of handling grievances or complaints in connection with rules, working conditions and so forth which are submitted by the employees?

A. Well, ordinarily those complaints, speaking of the transportation department, are filed with Mr. S. G. Burrows, superintendent. That is the first or initial step. They present time claims or grievances requesting conference to discuss the grievance or rule violations and so forth. And after conferences with him, if they are not settled, they frequently and have on occasion appealed Mr. Burrows' decision, if he didn't agree with them, to me as being the highest officer of the company authorized

to settle disputes. And they usually write in and request a conference.

Q. I don't think you need to go in any detail. Are you the highest officer of the company authorized to deal with such things?

A. Yes, sir.

Q. And if your decision is adverse, then they have a right of appeal to the Adjustment Board?

A. Yes, sir.

Q. How many seniority districts are there on the Belt Line?

A. One.

Q. Does that then include all the employees who are members of the Brotherhoods and who are represented by them?

A. Yes, sir.

Q. All on the same list and regardless of which point they work from or work to, they are all in the same district?

A. Yes, sir.

Q. And is that or not that a yard or switching district or is it a line?

A. It's all a switching terminal railroad. All considered in the same switching district and same tariff rates apply and there is no difference between one part of the railroad or another as far as employment or seniority goes.

Q. That applies not only to selection of men but also to the rates of pay and the duties?

A. Yes, sir.

Q. Mr. White, have you got the information, or Mr. Burrows got it, about the numbers of employees that would be affected by this strike?

A. I have that information.

Q. Will you give the Court the total number of employees and the number who will be affected by the strike and the number who will have to be laid off as a result of the strike although they are not members of the Brotherhoods.

A. I have this information here. I thought I had that information, Mr. Willcox.

THE COURT: Perhaps if Mr. White can't locate it, we can let it come in later.

You can locate it at supper time, Mr. White.

THE WITNESS: All right, sir. There were 172 employees and three organizations, including one—who still would be affected; that is, if they all went on a strike, would go on a strike. I think there's about 133 M. W. and S., maintenance and way structures, mechanical, and general office employees, assuming that the railroad ceased to function.

Q. With the men on strike, these Brotherhoods on strike, could you function?

A. No, sir.

Q. And would or would not the result be in laying off all those other men?

A. Yes, sir, they would be laid off.

MR. MACMILLAN: Your Honor, I couldn't hear those totals over here.

THE COURT: I think he said 172 originally, did you not?

THE WITNESS: Yes, sir, and about 133, I believe is the figure, but I can verify that.

THE COURT: Those are the approximate figures?

THE WITNESS: Yes, sir.

THE COURT: One hundred seventy-two plus 133?

THE WITNESS: Yes, sir; a little over 300.

(Then, at 5:25 p. m. a recess was taken until 7:30 p. m.)

EVENING SESSION

(The Court reconvened at 7:30 o'clock p. m.)

MR. WILLCOX: If your Honor please, we want to introduce as an exhibit a map showing the Belt Line, which contains in the corner a printed index to

the industries which is out of date, and with it we have attached an up-to-date index of the industries. I can put a witness on to prove it if there is any argument about it, but I don't think there is.

Any objection?

MR. MACMILLAN: No objection to the map. They are looking at this list.

THE COURT: Let the map be marked Complainant's Exhibit 2 and the attached list when it has been served by the proper parties be marked Complainant's Exhibit 2-A.

(Map received in evidence and marked Plaintiff's Exhibit No. 2.)

MR. WILLCOX: If your Honor please, there is on the map, I am quite sure your Honor has seen it, an index to the industries, which was the index when the map was made. That has changed with the addition of new industries and elimination of old and the typed list is nothing but a substitute for the printed index.

THE COURT: I understand.

MR. WILLCOX: Any objection to it, Mr. MacMillan?

MR. MACMILLAN: I have heard none yet. They have got to about page 6.

THE COURT: Suppose while the gentlemen are examining that, Mr. Willcox—because Mr. MacMillan is apparently not too interested in that—Mr. White was on the stand.

MR. WILLCOX: That concludes our examination of Mr. White.

MR. MACMILLAN: I have a few questions.

HARRY L. WHITE, JR., the witness on the stand at recess, resumed the stand and further testified as follows:

CROSS-EXAMINATION BY MR. MACMILLAN:

Q. Mr. White, in response to Mr. Willcox's question, you stated that you at all times were prepared and willing to negotiate this matter, is that correct?

A. Not to begin with, because we had no request for negotiations. We had no requests for a conference to negotiate. Never have had a request for a conference to negotiate.

Q. When you had that first conference on February 10th you gave them a letter at that time, did you not, in which you stated that you wanted it understood that that conference was not a negotiation?

A. That conference was held at my request during Mr. Burrows, the superintendent's, absence, at which time I requested Mr. J. L. Jones, the train master, to invite these gentlemen over to discuss the thing so that I could find out something about what they had in mind. The only letter that I had gotten up to that time was the one dated November 25th, which simply asserted their position as the letter shows. So this was a gesture on the part of the management to try to find out what the complaint was, so that we could further consider the whole thing, and it was a gentlemen's agreement that that letter and the conference would not be used in connection with any of the negotiations if they took place. It was not intended, and I so stated in the letter, and I am sure these gentlemen if they were there would confirm the understanding.

Q. You stated at that time that you were not willing to negotiate on February 10th and set it forth in the letter, did you not?

A. I said that conference was not for the purpose of negotiation. I had never refused to negotiate. I had never had a request to negotiate.

Q. Thereafter, after the Mediation Board got into it, you did negotiate, did you not?

A. Through the mediation proceedings, we negotiated.

Q. In the course of those negotiations did not proposals pass back and forth between the parties, one from the carrier and one from the defendants?

MR. WILLCOX: If your Honor please—Well, I have no objection to that question. That can be answered yes or no.

A. I would like to have that question restated.

(The last question was read by the reporter.)

A. That is correct; through the mediator. We had no direct conference with the organizations during any mediation case as such. I think on two occasions there was a joint conference held at the request of the mediator.

Q. I wonder if you would examine that document and tell us whether that is a copy of a proposal made by the complainant as a settlement of the issue.

A. I wouldn't say it was as a settlement of the issue. I would have to check my file to see if this is a copy.

Q. I wish you would.

MR. WILLCOX: If your Honor please, while he is checking it, this brings up the question I raised in my motion to strike. They are proposals and we may assume for the same of this argument that they are copies submitted for consideration in an effort to compromise, through the Mediation Board and under the supervision of the Mediation Board. All of them are efforts to reach a compromise and are therefore privileged and inadmissible and cannot be evidence of any admission or obligation to make any compensation. They are all under the direction and sanction of the Board and they are understood to be without prejudice and are privileged.

THE COURT: Well, I might say this, Mr. Willcox, that whether the carrier made any proposal or whether the Brotherhoods made any proposal would not affect me one iota. I can assure you of that. Now, I can understand in all negotiations, even in these trifling lawsuits that we have sometimes that

aren't worth $25, sometimes they are negotiated and settled for what we call nuisance value, $100 to $150. If there were a jury involved here, I think unquestionably it would be of vital importance. I don't see where it makes a whole lot of difference as to the details of the compromise or proposed compromises of the matters. I am more interested in establishing whether or not there have been negotiations which may or may not have complied with the requirements that are imposed before a strike can be called. I assume that is what Mr. MacMallan is trying to prove. Now, if he wants to just prove that Belt Line has made an offer and the Brotherhoods made an offer and the details of those offers, frankly, I am not interested in those at all.

MR. MACMILLAN: Nor do we offer them for that purpose, your Honor. Mr. Willcox is free to strike out any portion of the contents of those proposals. We offer them merely as proposals, as evidence of negotiation and as evidence of compliance with the Act.

MR. WILLCOX: If I am free to strike out any part of them, I will strike out all of them. I will accept your proposition. Your Honor says they will not make any impression upon you, and I am sure that that is correct, and that in itself seems to me to be conclusive that they ought not to be admitted because we don't know who is going to pass on this after your Honor does and whether they will have the same impression you do. But it is already stipulated in the admissions concerning the allegations that there were negotiations, that those proposals were offered and rejected. And the witness himself has just testified that proposals were made and rejected. Now introducing the letter with a written proposal isn't necessary to prove something that is stipulated and to which the witness has already testified and which may later prove to be prejudicial.

THE COURT: Well, the only thing that I can comment on that is that Mr. White did testify on direct examination that no complaints or grievances had been submitted to him. Now, that may be correct. However, would not a proposal by the Brotherhood in effect constitute a complaint in the course of negotiations? That is what I am talking about.

MR. WILLCOX: A proposal made through the Mediation Board in an effort to compromise would not in my humble opinion be a complaint. Your Honor, we have in the record the facts. We have it through his testimony and by stipulation and admission that there were negotiations, that the board called us into session, proffered its service, and that they did negotiate and that offers were submitted and counter-offers were submitted—I may vary the words, too much details or too little—and rejected. There never was any agreement. So to prove that Mr. White offered this proposition and the Brotherhood offered that proposition is nothing but giving the details of the offer and cannot be admissible for anything in the world unless the Court can say they admit they are liable for something, here is the admission because they made an offer.

THE COURT: I can assure you as far as I am concerned it would not faze me one iota. You may be right when you get into another court, either side; and I assume some other court will ultimately determine the final question, in any event, and it might have some effect on some other court.

But, Mr. MacMillan, you have stated that you do not want the details of the proposals. If Mr. Willcox has conceded for the record that through the Mediation Board or the individual mediator proposals did pass, one from the carrier, one from the Brotherhood, which ultimately I assume were rejected by one or the other, what else would you want to prove by the letter that you have exhibited to Mr. White?

MR. MACMILLAN: Not a thing, your Honor. If it would be stipulated that written proposals flowed back and forth between the parties, the details of those writings are of small consequence. *And I want to make it clear we do not contend that Mr. Willcox has been bound, prejudiced, or in any way precluded by anything that happened during mediation. We are trying to present to the Court a full and complete picture of what did happen and how far the parties did go in negotiation.* (Italics supplied.)

THE COURT: You have said that proposals flowed, and I emphasize the use of the word "flowed." Do I understand that according to your contention one proposals came from the carrier and one proposal came from the Brotherhoods, and that they went through the Mediation Board and were rejected?

MR. WILLCOX: More than one, your Honor.

THE COURT: More than one?

MR. MACMILLAN: Several.

THE COURT: Several proposals? From both sides?

MR. MACMILLAN: And they were in writing and went back and forth.

THE COURT: Mr. Willcox, are you willing to stipulate to that?

MR. WILLCOX: Yes, sir; I have alleged it, that various propositions were made.

Is your Honor familiar with the procedure of the Mediation Board?

THE COURT: I am generally familiar with it, Mr. Willcox.

MR. WILLCOX: Have you ever been through one?

THE COURT: Once.

MR. WILLCOX: May I make this a brief statement of it. You would think when you get the Mediation Board that you would sit down and confer and discuss the thing. They don't do that. When we went into Washington—

MR. MACMILLAN: Your Honor, I object to counsel's statement as to what happened when he went to Washington.

MR. WILLCOX: I am just going to tell you the procedure. We went in and met Mr. Thompson, the executive secretary, and he says to the employees—

MR. MACMILLAN: Your Honor, I renew my objection.

MR. WILLCOX: "Go on to the library."

THE COURT: Mr. Willcox, you can't testify.

MR. WILLCOX: If your Honor is interested in the procedure, I can prove it by Mr. White.

THE COURT: If you prove it by Mr. White, just don't go ahead and open the door so Mr. MacMillan can get these letters in you are so vigorously objecting to. I have sustained the objection now to the letter by reason of the stipulation entered into between counsel.

Q. (By Mr. MacMillan) Mr. White, on what day and at what place did you offere to arbitrate this matter with the defendants?

A. We have not offered to arbitrate at any time. We have not been asked by the defendants to arbitrate. There is no record in our entire proceedings where that question was put to us by the defendants or the National Mediation Board.

Q. In other words, at no time was communicated to you through the mediator any offer of arbitration on the part of the defendant?

A. As Mr. Willcox started to tell you—

Q. If you will just answer my question. During the course of mediation, while the National Mediation Board had jurisdiction of the matter, was at any time any offer of arbitration made to you through the mediator from the defendants?

A. There was not but I would like to qualify that by saying this: that the mediator would go over to the organizations and—

Q. Mr. White, I am not interested in procedure. Mr. Willcox is going to give you a chance to go into that at length.

A. All right.

Q. Mr. White, do you know at what year or what date the Port Norfolk place of reporting or the yard was commenced?

A. I think it was around 1897 or 1898. That is when the operation of the Belt Line was officially started.

Q. And at approximately what date did Sewells Point place or yard commence?

MR. WILLCOX: That is all stipulated, your Honor.

A. The records, according to Mr. Willcox's figures, show around 1916 or '17. I know there were locomotives running in that vicinity at that time but whether they had a terminal established or not, I don't know. I have been there thirty years but that was before my day.

Q. In 1941 and '42, Mr. White, you were not president of the railroad, were you?

A. No, sir; I was vice-president and general manager.

Q. At that time did not the complainant open a place of reporting or a yard at Money Point?

A. It opened a place of reporting; not a yard. No tracks were built. It was simply for the seasonal operation of an extra crew down there because of congested conditions during what we call the fertilizer season.

Q. Now, in the course of that, I believe claims were prepared and filed with the railroad, were they not?

A. That is correct.

Q. Do you recall being present at a conversation in the presence of Mr. Mathews, a defendant in this proceeding, Mr. Joe Lavine, Mr. O. K. Hedges, Mr. Robert Early, and a Mr. Crawford, in which the defendants advised you that they were abandoning those claims because they could not properly be submitted to the Adjustment Board?

A. I don't recall that instance. I know that at the time that terminal—that is, the reporting point was established for the one crew, that the former president, Mr. M. S. Hawkins, handled the case, and there is a letter in the record here that he wrote to two of the grand chief officers, or Grand Lodge officers, in connection with those time claims. I have a copy of it here. And the claims were not progressed. I did not handle that at the time.

Q. Then the yard—or rather, that reporting place was abandoned in '42, was it not?

A. Well, it was discontinued after the fertilizer season, when the crew was not needed for continuous operation. Now, whether—It wasn't abandoned in the sense it was eliminated. I don't recall now just whether the following year it was put back or not.

Q. And thereafter, the men have been paid for, or rather, furnished transportation and have been transported on claimant's time when they have reported at Money Point?

A. At what we call the Smith-Douglass, or with the Smith-Douglass crew. I think Mr. Willcox explained to the Court this morning that the Ford operations and the —what we call the Smith-Douglass or Money Point operations, which in effect is that we, in order to keep those two areas in operation, we transport the men in our station wagon on the company's time and one crew is relieved by the other. They are seasonal and only one crew is involved.

Q. Now, prior to your notice which was effective September 25th, changing the place of reporting from Port Norfolk to Berkley, what was the practice of the complainant as to transporting men from Port Norfolk to Berkley when they would have occasion to be on what

you call a trick, to do the second trick—isn't that what you call it?

A. Well, that wasn't involved as far as I know, except at the Ford plant when we were operating over there.

Q. I am talking about Berkley.

A. Well, all crews operating out of Port Norfolk and reported back to Port Norfolk. There was no occasion for transporting the men.

Q. You mean there never was occasion for having men transported by company vehicle on company time to Port Berkley?

A. That is right.

Q. Never was such occasion?

A. There might be if an engine broke down or something like that. But there was no set program.

Q. Now for the purpose of clarification, Mr. White, some of the details here, you acknowledged the receipt of the letter dated November 25th, 1955, from these defendants to the complainant?

A. Yes, sir.

Q. You acknowledged the letter dated February 10th, 1956, which you, yourself—or rather, the complainant wrote the defendants, February 10th, that was the letter that was delivered to them at the conference?

A. That is the one I delivered to them at the conference.

Q. You acknowledged receipt of the letter dated February 13, 1956, which was a letter from the defendants to the complainant?

A. Well, I will have to get my file to check that.

Q. Let me show it to you in the answer. I think you will recognize (handing). I merely want you to acknowledge whether you received that letter.

A. What is the date of it?

Q. February 13th.

A. It don't show. Oh, I see.

Q. It was addressed to you and was from the Brotherhood.

A. That is the letter I received. I think I can check in my file.

THE COURT: That is in paragraph what, Mr. MacMillan?

MR. MACMILLAN: Paragraph 11 (c) of the defendant's answer.

Q. Mr. White, you received from the Mediation Board the copy of the proposal of settlement set forth in paragrah 11 (h) of the answer, did you not?

MR. WILLCOX: Now, if your Honor pleases, the same question. The only difference is this was one submitted by the Board itself in the same conference in Washington.

THE COURT: This, though, he has only asked Mr. White whether or not he received the letter.

MR. MACMILLAN: Received the contract, your Honor—I mean the agreement, the proposal.

THE COURT: Received the proposed agreement, which of course is not binding on the Belt Line. It just goes to further substantiate the fact that there were proposals that went back and forth. I think probably your point may be well taken as to the contents of these letters and Mr. MacMillan has conceded that the contents are not material. But if he wants to further supplement this stipulation that the proposals did go back and forth, I don't see where there is any harm whether Mr. White acknowledges that he did receive such a letter.

THE WITNESS: Judge, may I get my file on this?

THE COURT: Yes, indeed.

Let the record indicate that there is no objection to Complainant's 2-A, which is the list of industries that is referred to and should be attached to Complainant's Exhibit 2 which is the map.

(List received in evidence and marked Plaintiff's Exhibit No. 2-A.)

THE COURT: Show Mr. White the letter that you have reference to.

Q. (By Mr. MacMillan) Mr. White, I make reference to the Mediation Board agreement set forth in defendant's answer, 11 (h), which purports to be an agreement or proposal for agreement signed by the various defendants and by the mediator but not signed by the railroad, and I ask you whether that proposal was transmitted to you by the mediator subsequent to July 23rd, 1956.

A. No, sir. The history of that is that at the mediation meeting in Washington on the 23rd of July, Mr. Leverett Edwards, one of the mediators, after discussing the various proposals with the organizations and the company's representatives, in the late afternoon he had what he thought was an acceptable agreement, or a proposal. *It was not an agreement. It was not a tentative agreement. It was simply something that he had written himself in an effort to settle the case.* Now, I have here a mimeographed sheet which he handed me during that conference. It's headed "National Mediation Board, Mediation Agreement, NMB Case E-29." I think it's a duplicate of what you have. Then attachment to mediation agreement is the so-called proposal.

Q. My question is: You did receive that?

A. I received that.

Q. And rejected it?

A. No, sir, it was not submitted as an agreement. It was submitted as a proposal.

Q. I say, and did you reject the proposal?

A. Let me finish, please.

Q. Excuse me.

A. I told the Mr. Edwards, and the conference, that we had to have time; the management of the company had to have time to consider this proposal. It was pre-stated that when we went in there for the joint conference *that this was not an agreement; it was simply a proposal prepared by Mr. Edwards and was for consideration by both parties.* This agreement that you have here, which is signed, was signed the next day, according

to the record. Mr. Willcox, general counsel, Mr. Burrows, the superintendent, and I, with the permission of Mr. Edwards, came back to Norfolk on the Washington boat that night, after all had been done that could have been done according to Mr. Edwards. *So we did not in Washington do any more than read this over and have it presented to us.*.

Q. I understand that. My question was, did you thereafter receive and reject that proposal?

A. I thereafter got a letter from Mr. Edwards—rather, from Mr. Thompson, secretary, and I replied to it and told him that the Belt Line regretfully rejected the agreement.

Q. That was my question. You did receive it and you did subsequently reject it?

A. Rejected the proposal.

Q. That was my question.

A. That is correct.

MR. MACMILLAN: No other questions, your Honor.

REDIRECT EXAMINATION BY MR. WILLCOX:

Q. Mr. White, Mr. MacMillan has asked you about the Ford plant and the Smith-Douglass operations, about the transfer of crews. Explain those in detail to the Judge; why you do it, how often it occurs, and what it is, and what facilities, if any, you have at the Ford plant or the Smith-Douglass plant for having those reporting points.

A. Mr. Willcox, I believe that can better be done by Mr. Burrows, our operating superintendent. I will be glad to tell you all I know about it but I am sure he knows the details more intimately than I do.

Q. You have testified that the Belt Line rejected that proposal. As a matter of fact, all the proposals that were submitted were rejected by one side or the other, were they not?

A. That is correct.

Q. Now, explain to the Court how come about Berkley Yard; what part of your operations take place

there and what is its relation to the rest of the road, whether it is the center of activities or causal point or something else.

A. Well, Berkley Yard is more or less the center of activities as far as the branching out of the tracks is concerned, and it's the largest classification yard we have. More traffic passes through there than any other yard, and the operation is more constant, I would say; we have crews that work there around the clock, 24 hours a day, and it's a point from which the crews can be dispatched more efficiently and economically under certain operating conditions than from other points. I'd say it was the center of the wheel, more or less.

THE COURT: It is the focal point of your operations? In other words, from there you can go into Norfolk, the city proper. Of course, Berkley is part of Norfolk city, but you go into the main part of Norfolk City, and you can also go into the city of Portsmouth from there?

THE WITNESS: And down the southern branch, and the Sewells Point.

MR. WILLCOX: That is all.

HARRY L. WHITE, JR., EXAMINED BY MR. MACMILLAN: (Tr. P. 158).

Q. Mr. White, during the course of mediation, either in Norfolk or in Washington, was any offer of arbitration made to you by the defendant?

THE WITNESS: Do I have to answer that question, Judge?

MR. WILLCOX: If your Honor please, that is a question I understood you to rule out.

THE COURT, No, I ruled out the details of any offer. I didn't rule out—

MR. WILLCOX: I object to it on the ground that it is immaterial and irrelevant.

THE COURT: Objection overruled.

A. Judge, as Mr. Willcox has brought out, the mediator, during the five-day session in Norfolk and the time that we were in Washington and on other occasions, had suggested all the possible means of settling the dispute. *But we did not receive a direct offer from the other side to arbitrate. We did not make a direct offer to arbitrate. It was just one of the suggestions that were made I suppose to both sides by the mediator. We have not received any offer to arbitrate from the organizations nor have we made any.*

Q. Did the mediator communicate to you any offer from the defendants to arbitrate?

A. He did not specifically ask us if we would arbitrate.

Q. Did he—

A. This is behind closed doors now.

Q. I am not asking you did he specifically ask you to. I am asking you whether he communicated to you an offer from the defendants to arbitrate.

A. *He did not. He consistently said they would not arbitrate; that they would not go to the mediation—I mean to the Adjustment Board or would not consider a special system board of adjustment. That file, the last we got closing out the case—*

Q. I am asking you now about Norfolk. We'll get to the other in a minute. You said no offer of arbitration was ever communicated to you by Mr. Roadley?

A. It was not.

Q. But suggestion of arbitration was made?

A. No. He mentioned the ways that the case could be progressed. We told him from the outset that we had a rule in the book which we thought gave us a right to make this change; we did not feel negotiations were necessary. We hadn't offered to negotiate. We hadn't received a request. The only thing that the file will show, and the Brotherhood's records will shown, that they made the statement we had no right to make the change without negotiations in accordance with the Railway Labor Act as amended.

Q. You are saying that at no time did Mr. Roadley communicate any offer of arbitration from the defendants?

A. *He did not.*

Q. Now, when the National Mediation Board proffered arbitration at the conclusion of the case, you did not accept arbitration then, did you?

A. *They did not proffer arbitration.*

Q. I don't mean proffer it. They inquired whether you desired to arbitrate?

A. *They never mentioned arbitration.*

MR. WILLCOX: The letter speaks for iteslf, Mr. MacMillan, if you are talking about the letter from the Mediation Board.

MR. MACMILLAN: I am.

MR. WILLCOX: Look at the letter.

A. Sure it was introduced the last time. It is a letter of June 30th, I think.

THE COURT: Here is a letter of June 30th, introduced as Plaintiff's Exhibit No. 1, signed by E. C. Thompson, Executive Secretary of the National Mediation Board, addressed to Mr. White, and also to the several presidents or grand chief engineers of the Brotherhoods. Do you wish to see it, Mr. MacMillan?

MR. MACMILLAN: I am attempting to find that letter and the complainant's reply to the letter.

MR. WILLCOX: Both in evidence.

MR. MACMILLAN: Just so they are in evidence.

MR. WILLCOX: We offered just one paragraph and you offered the whole letter from the complainant.

Q. (By Mr. MacMillan) Mr. White, did you ever have any communication with the Mediation Board after the letter of July 30th addressed to you from Mr. Thompson? Look at that letter.

A. I have a file there I'd like to get to refer to it. I have a complete record of everything that has happened.

Q. I show you a letter designated Defendant's Exhibit 1 and ask you if that is the letter you wrote in response to the letter dated July 30th, '56.

A. That is the letter.

Q. Did you have any other correspondence other than those letters on the question of arbitration?

A. We haven't had any correspondence. We had no correspondence on negotiations in connection with arbitration as such.

Q. That is not my question.

A. You mentioned arbitration.

A. I beg your pardon. You might have misunderstood me.

A. No. I understood you to say arbitration.

Q. After the letter of August 13th, which you wrote Mr. Thompson, have you had any other letters from the Mediation Board dealing with the question of arbitration? The answer is either yes or no.

A. I have to have time to look at my file.

Q. That is all I am asking. You are welcome to examine the file as much as you need.

A. I have had several letters since that time.

Q. Did any of them deal with the question of arbitration?

A. None whatsoever.

Q. I am talking about after August 13th now. None dealt with arbitration?

A. (Shaking head in negative.)

Q. Did you ever accept the suggestion of arbitration as contained in the letter of Mr. Thompson to you under date of July 30th?

A. *That is not arbitration, sir. That was a special system board of adjustment, which is quite a distinction between arbitration. We didn't talk about arbitration.*

Q. *You didn't talk about it?*

A. *No, sir.*

Q. And you didn't offer?

A. Didn't offer; because we have consistently contended—

Q. Just answer my question. You did not offer arbitration?

A. We did not offer arbitration.

THE WITNESS: May I say a word there, Judge, in that connection?

THE COURT: I guess you had better get Mr. Willcox—

THE WITNESS: I will wait until he asks me then.

REDIRECT EXAMINATION BY MR. WILLCOX:

Q. Mr. White, Mr. Mathews said that in 1941 he advised you that the railroad employees were abandoning their time claims in connection with Money Point because they had found out that the Adjustment Board did not have jurisdiction. Did you ever receive any such advice?

A. No, sir.

Q. In connection with the questions that Mr. MacMillan just asked you about arbitration. I thought I understood you to say that one of the mediators said the men would not arbitrate?

A. They did.

Q. You remember which one that was?

A. Mr. Roadley.

Q. Now, August 13th you replied to the Mediation Board's letter of July 30th. Afterwards did you get a telegram from the board?

A. Yes, sir, I did.

Q. Will you read that telegram to the Court?

A. Telegram is dated August 16th, 1956, 10:53 a.m. It is addressed to H. L. White, Jr., President and General Manager, Norfolk Portsmouth Belt Line Railroad Company, Norfolk, Virginia. It reads as follows:

"Re this board Case E-29, Norfolk and Portsmouth Belt Line Railroad, BLE, BLF&E, and BRT on subject of establishment of point in Berkley Yard, Norfolk, as point for going on and off duty of certain

yard crews, the organizations have notified this board that they are not agreeable to referring dispute to either First Division, National Railroad Adjustment Board, or special board of adjustment. The carrier's position is that any claims arising out of the proposed change, if and when made, should be progressed through National Railroad Adjustment Board, First Division. Under these circumstances you are hereby notified that the board mediation efforts in this dispute have been terminated and our file on this case has been closed as of this date by direction of the National Mediation Board. Joint White, Brown, Gilbert, Kennedy. Signed E. C. Thompson, Executive Secretary."

S. G. BURROWS, SWORN (Tr. P. 86)

DIRECT EXAMINATION BY MR. WILLCOX:

Q. You are Mr. S. G. Burrows, superintendent of the Belt Line, are you not?

A. Yes, sir.

Q. How long have you been with the Belt Line?

A. January, 1942.

Q. Where is your office?

A. Port Norfolk.

Q. Where do you spend your time, most of your time?

A. Berkley Yard.

Q. That is the focal point of your operations?

A. That is the hub of the wheel. Everything passes through Berkley but a few local cars that come from the Southern lines around Port Norfolk. Everything else goes through Berkley.

Q. Mr. Burrows, I hand you here seniority list and I ask you what this paper is.

A. That is a seniority list of all employees in engine and train service as of July 18, '56, separated between conductors, a special list for conductors, special list for engineers who are qualified, and then a regular list for the train service, which includes everybody, and also the engine service, which includes engineers and firemen. In

other words, the conductor—the qualified conductors, there is a list separated for them; the qualified engineers, there is a list separated for them; and then the main list has the conductors and trainmen on there and their proper sequence, and likewise for the engine crews.

Q. And the notes there are explained in footnotes?

A. The footnotes, I put in there; doctored this up in red, that represents men that are not actually working in train service, like yardmasters and off sick and what not. But this here is not on the main list. This is a list that I furnished up myself.

Q. That is men who are disabled, furloughed, and so forth?

A. Not actively working in train service.

Q. Does that give the date of employment of each man?

A. Yes, sir.

MR. WILLCOX: I offer that in evidence, your Honor.

THE COURT: Complainant's Exhibit No. 3.

(Received in evidence and marked Plaintiff's Exhibit No. 3.)

Q. Mr. Burrows, have you examined your rolls to see how many of the employees—and when I speak of employees, I am limiting it to those in train and engine service—who actually live in Norfolk are reporting regularly to Port Norfolk for duty, before this change was made?

A. Yes, sir.

Q. How many?

A. Eight.

Q. Have you examined it to see how many of those who live in Port Norfolk were reporting regularly to Sewells Point?

A. Yes, sir.

Q. How many is that?

A. Eight.

Q. Now, of course there are from time to time extra men and emergency men that serve on those crews?

A. They were regular men that I speak of.

Q. Mr. Burrows, mention has been made of the operation at the Ford plant and at Smith-Douglass concerning the relief of some crews at least by sending them from Port Norfolk in an automobile. Explain each of those movements to the Court separately, please, and the reason for them.

A. Do you want the Ford operation explained in detail?

Q. No, I don't think you need to go in detail unless my friend wants it. Just simply give the periods of the shift and tell whether or not its is necessary for a continuous operation over there and how many crews you send over there.

A. We work the Ford plant about ten months a year and the Virginian work it the other two.* * *

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(Tr. P. 95)

Q. Now, the first trick is from eight to four, is it?

A. On that crew, yes, sir.

Q. And the second from four to midnight?

A. The second is from three to eleven.

Q. And that one crew is the oniy one you relieve that way?

A. At Ford, yes, sir.

Q. If they did not use a station wagon, is it not true that the whole engine would have to come back to Port Norfolk to bring those men?

A. Yes, it would have to come back and we couldn't give the Ford plant—I don't believe that we would give the Ford plant the service that they ask.

Q. We are not talking about the Ford plant. But as a practical proposition you have got to send them out there or bring the engine back to Port Norfolk?

A. That is right.

Q. And I think it is safe to assume that bringing the engine back to Port Norfolk in itself would be more expensive than operating a station wagon, wouldn't it?

A. By far.

Q. To say nothing of the time of the men. Now, Mr. Burrows, the job at Smith-Douglass is substantially the same except that is limited to the fertilizer season, isn't it?

A. And not an assembly line. And farther to go with the engine.

THE COURT: When you speak of Smith-Douglass, I suppose there are other industries, fertilizer industries?

THE WITNESS: In the vicinity, yes. Smith-Douglass is the major one in that territory.

THE COURT: But it is called the Money Point section?

THE WITNESS: Yes, sir.

Q. (By Mr. Willcox) They are the only two operations of that kind you have, are they not?

A. Yes, sir. Only that sometimes it's either the Smith-Douglass crew or the crew working a little further up in some other industries. It's one or the other, but it's one crew. And it just happens through part of the fertilizer season, which doesn't start good maybe until February, March, April—it runs into February and March, April and some part of May. But of course that crew is not relieved during all that period, but a big part of it.

Q. Have you or not a yardmaster office or a yard office either at Money Point or at the Ford plant?

A. No, there is no yardmaster's office at either the Ford plant or Money Point.

Q. Are there any facilities at either place for the crew?

A. No, sir.

Q. No washroom, locker room, or anything of that kind?

A. No, sir.

THE COURT: Mr. Willcox, this afternoon you asked Mr. White a question about how many men would be affected. I don't know whether you even want to ask Mr. Burrows that question. It doesn't make any difference to me.

MR. WILLCOX: I will ask him.

THE WITNESS: I have it there but I think Mr. White has found that file. I would have to look. I think it was 107.

MR. WILLCOX: I think Mr. White gave it.

THE WITNESS: He gave it all, but I don't think he gave the engine and train service. But if I recall right, it's about 107 men in train service and 75 in engine service. That is within one or two.

THE COURT: If I recall, Mr. White gave an approximation which, if that is satisfactory, is good enough, around 170 some all told I think on one type of service and 130 some odd in another type.

MR. WHITE: That figure, Judge, is 171 in train service, including one hustler, and 138.

Q. (By Mr. Willcox) Are those the correct figures, Mr. Burrows?

THE COURT: Well, that is near enough.

MR. WILLCOX: That is all.

CROSS-EXAMINATION BY MR. MACMILLAN:

Q. Mr. Burrows, have you had an opportunity to compute the time or wages that will be saved by having the men report to Berkley rather than to Port Norfolk?

A. I haven't worked up any savings on that but it would save to—I think thirty minutes a crew would be a very fair average, around. They may do it a little bit quicker one way or another but I think an average of thirty minutes a crew, you'd save on the relieving time at Berkley. But that is not all you save.

Q. I understand that. When you say that is not all you save, sir, what do you mean by that? You are referring to taking the engine back and forth?

A. I am referring to you get more flexibility and more utilization out of your electric engines, your Diesel engines at Berkley, and you will accomplish much more switching in Berkley Yard due to a continuous operation. Prior to that there was lots of times a gap of maybe thirty or forty minutes there while one crew was going in and the other was coming out. So it shows up in the classification of cars at Berkley and a better utilization of the engines due to the round robin relief.

* * * * * * * * * * * * * * *

J. W. HAYES, a witness for the defendant, was sworn (Tr. P. 129)

EXAMINED BY MR. MACMILLAN:

Q. Do the members of your lodge want to go to Berkley without an agreement covering these working conditions?

A. No, sir, not without an agreement to cover it.

Q. Are they working against their will in Berkley today?

A. Well, they are, I'd say, and will be until an agreement is worked out to cover these hardships that are imposed on them, yes, sir.

* * * * * * * * * * * * * * *

CROSS-EXAMINATION BY MR. WILLCOX: (Tr. P. 130)

Q. Mr. Hayes, there isn't any doubt in the world about the fact that this controversy centers around the men's claim that they are entitled to time and expense for travel from Port Norfolk to Berkley?

A. I don't know that I understand your question, Mr. Willcox.

Q. Let me make it a little plainer so you can.

THE COURT: You are talking about this controversy right now?

MR. WILLCOX: The controversy between the Brotherhoods and the railroad company which led to this situation.

Q. I think you have testified to it but I just want to get it straight. You admit that is a prerogative of management, the railroad company has a right to use Berkley Yard as a starting point and stopping point of trains?

A. They have that right.

Q. And you contend and the Brotherhoods contend that as a condition precedent to exercising that right they must negotiate an agreement with the Brotherhoods providing for what you call the hardships, that is, the time consumed and the expense; that is correct, isn't it?

A. I didn't say that was absolutely necessary. I don't think, Mr. Willcox, I said that was our purpose in trying to negotiate an agreement to cover those hardships. That is what we were protesting, the fact that it hadn't been done.

Q. Those hardships have been the subject of the negotiations, haven't they?

A. They have, yes, sir.

Q. You speak of an hour's time in each direction. You know how far it is from Port Norfolk to Berkley Yard?

A. Well, that depends on the way you go, sir.

Q. Take the most direct route through the tunnel and into Berkley.

A. The best I recall, we have it here in this file, something around —

Q. Four and a half miles, isn't it?

A. The most direct route, around five miles.

MR. MACMILLAN: I might help, Mr. Willcox. We have not taken issue with the testimony of Mr. Bowen, I believe the name was, as to the distances and expenses involved.

I will tell Mr. Willcox in advance, we will offer a witness who will prove the time and expense involved to go by public conveyance, which Mr. Bowen omitted. But other than that, we have no objection to their testimony.

Q. (By Mr. Willcox) Mr. Hayes, it doesn't take an hour to go from Port Norfolk to Berkley Yard, does it, by either route, unless you go around the toll free route?

A. Mr. Vaughan, of our organization —

Q. I am not talking about Mr. Vaughan. I am talking of your own knowledge.

A. Well, I never have been over there, Mr. Willcox. Mr. Vaughan has timed it. He can answer the question.

Q. *Let's talk about the modus operandi of the mediation. Is is not a fact that when the mediator, Schoonover came down here that we all met in the terminal building at the Union Station and that you and your associates were in one room, Mr. White and Mr. Burrows and I were in another?*

A. *Part of the time, that was the case.*

Q. *And Mr. Schoonover went in and talked to you in our absence?*

A. *That is right.*

Q. *And then he came in and talked to us in your absence?*

A. *That is right. And then we all talked.*

Q. *And then at least once and possibly oftener we got together and had a general discussion?*

A. *That is right.*

Q. *Now, when we went to Washington you were there, weren't you?*

A. *That is right.*

Q. *And most of us or several of us met outside the building and went in the building together; that is correct, isn't it?*

A. *Yes, sir, to begin with.*

Q. *To begin with. And then they separated us. They put the Brotherhoods in one room and put us in another?*

A. *That is true.*

Q. *And Mr. Edwards went backwards and forwards?*

A. *Yes, sir.*

Q. *And we, of course, don't know what he said to you all and you, of course, don't know what he said to us?*

A. *No.*

Q. *And the only time we got together was late in the afternoon?*

A. *That is right. It was at the time he made the proposal to all of us.*

Q. *And that was the only time that we got together there?*

A. Yes, sir.

Q. You speak of the hardships. Some of the employees, most of them I believe, live in Portsmouth, do they not?

A. A good many of them, yes, sir.

Q. Some live in Norfolk?

A. Some, yes, sir.

Q. And some live in Berkley or South Norfolk?

A. I couldn't testify to that.

Q. Well, assume that to be a fact. Going to Berkley Yard is no hardship on those people, is it?

A. Not those few that live in that community.

Q. And it's no hardship on those that live in Norfolk, is it, as against Port Norfolk?

A. No, sir.

Q. And under the agreements and the working rules of the Brotherhood, men have a right to bid on jobs according to their seniority?

A. That is right. May I qualify that last answer?

Q. Yes, sir.

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(Tr. P. 139)

Q. (By Mr. Willcox) Mr. Hayes, have you with you the copy of the telegram that you sent to the Mediation Board in February?

A. I will have to check this file; if you will bear with me.

Q. When this matter was first reported to them. February 13th I think is the date of it.

A. Yes, sir, I have a copy of it here.

Q. Will you read it.

A. Addressed to Mr. E. C. Thompson, Secretary, National Mediation Board, Washington, D. C. Says:

"Serious situation existing on Norfolk Portsmouth Belt Line Road as the result of management *arbitrarily moving the terminal from Port Norfolk to Berkley*, a distance of approximately six miles, without negotiating with committees. Request your board take immediate jurisdiction and notify carrier to hold matter status quo pending mediation proceedings. Letter follows."

Q. That is the telegram that you sent?

A. That is the telegram that was sent, yes, sir.

Q. Mr. Hayes, since this move has been made, has any member of the Brotherhood of which you are the general chairman filed a time claim for the time involved in going to Berkley Yard or for the expense incurred?

A. No, sir. We don't have a rule to cover it. We haven't been able to negotiate an agreement to cover that.

Q. None has filed a claim?

A. None has reached me.

Q. Has any member of the Brotherhood with which you are connected filed any claims of any kind growing out of the move since the move was made?

A. *Not to my knowledge, Mr. Willcox. When we make claims we have to have a contract rule to base them on and we don't have any covering this situation.*

Q. *Do you mean to say that you have no contract rule that would entitle the men to claim extra pay for the time involved?*

A. *No, sir.* That is what we were trying to negotiate, a rule to cover this particular move here and hardship that was imposed.

Q. Let me be sure that I get you right. I don't want to be confused myself. As I understand you now, you admit that *there is no rule in force on which you could base a claim, on which the employees could base a claim for compensation during the time consumed in travel from Port Norfolk to Berkley and return?*

MR. MACMILLAN: Mr. Willcox, we have admitted that in the answer.

A. *We have said that, yes, sir. That is the truth.*

Q. And what you want to do is to negotiate a contract or a rule which will entitle you to that?

A. *That is the truth, yes, sir. And as stated to you and to Mr. White in conferences, we feel that it is incumbent upon the railroad to serve notice under the Railway Labor Act when they intend making such change.*

Q. We understand that. That is your contention. Now, what is the time limit in which a trainman can put in a time claim after he has done the work?

A. I think it's 60 days — 45 — 60; under the agreement.

* * * * * * * * * * * * * * * * * *

C. W. MATHEWS, a witness for the defendants, was duly sowrn (Tr. P. 146)

EXAMINED BY MR. MACMILLAN:

Q. Would the members of your lodge be working in Berkley if it were not for the injunction that has been entered in this Court?

A. No, sir. The members, they voted 100 per cent to strike the carrier unless it gave them a working agreement or working condition according to the change.

THE COURT: I don't understand this Court entered the injunction.

MR. MACMILLAN: If I said that, I was in error, your Honor.

THE COURT: I just want to get the facts right.

Q. Are the men working in Berkley against their will?

A. Yes, sir, I would say they are.

MR. MACMILLAN: Answer Mr. Willcox

CROSS-EXAMINATION BY MR. WILLCOX:

Q. Mr. Mathews, I understood you to say the last that you were paid—I am speaking now of the 1941 job when you were at Money Point—for time from Port Norfolk to Money Point and return?

A. No, that was the dispute, Mr. Willcox. We were after an agreement for the pay, transportation and time consumed traveling to and from Berkley.

Q. You were not paid then?

A. No, sir.
Q. And you put in claims?
A. Yes, sir.
Q. And did not progress them beyond the company?
A. We didn't.

MR. MACMILLAN: Mr. Willcox, his question was directed what did the company do after they abandoned Money Point and he said at that time they were paid.

MR. WILLCOX: I misunderstood him.

THE WITNESS: I said after they abandoned, the operation was carried back to Port Norfolk and we were placed first in taxicabs and then station wagons and carried over there and our time begun when we reported at Port Norfolk and ended when we relieved at Port Norfolk.

Q. You are talking now about the footboard relief down at the fertilizer section?
A. That is right; Money Point.
Q. And also the footboard relief at the Ford plant?
A. That is correct.
Q. And those are the two times you are talking about. You say the men are working in Berkley against their will?
A. I'd say yes.
Q. Does that apply to those who live in Norfolk too?
A. Well, Mr. Hayes, I think he cleared that. I don't know about the ones that live in Norfolk.
Q. Does it apply to the ones that live in Berkley?
A. I guess it would apply to all. I don't know. I couldn't express the men's opinion, Mr. Willcox. I don't know.
Q. What objection can a man who lives in Norfolk have to reporting to Berkley Yard rather than to Portsmouth?
A. *We took that into account. And the men in Norfolk are not involved.*
Q. That isn't the question I asked you. What objection could a man who lives in Norfolk have to reporting to Berkley Yard instead of to Port Norfolk?

A. Well, I don't know. Of course, I can only speak for myself.

Q. *It would be easier to get to Berkley, wouldn t it?*

A. *Absolutely. For me, it would.*

Q. *Easier and cheaper?*

A. *That is right.*

Q. *And you live in Norfolk?*

A. *That is right.*

Q. And the same thing is obviously true of those who live in Berkley. And if nobody else wants those jobs the men who live in Norfolk and are now reporting to Port Norfolk could bid them in?

A. Anyone who has seniority can bid on any job.

* * * * * * * * * * * * * * * *

FOY K. VAUGHAN, a witness for the defendants was sworn (Tr. P. 151)

Q. Would the members of your lodge be working in Berkley if it were not for the injunction entered in this cause?

A. No, sir.

Q. Are the men being worked in Berkley against their will at this time?

A. I would say yes, sir.

* * * * * * * * * * * * * * * *

CROSS-EXAMINATION BY MR. WILLCOX: (Tr. P. 153)

Q. You say the company has furnished transportation to Berkley. Those have been the instances of the footboard relief at the Ford plant?

A. No, sir.

Q. They don't do it there?

A. Oh, they do it there.

Q. And they have done it at Money Point?

A. Yes.

Q. And sometimes they have an emergency and they have to send a crew over there and they do it then?

A. In Berkley Yard, yes, sir.

Q. *But they don't do it regularly because they don't transport crews regularly except the Ford plant and the Money Point plant?*

A. *That is right.*

(All italics in quoted testimony have been added).

OPINION OF THE DISTRICT COURT

On September 24, 1956, the Circuit Court of the City of Norfolk, Virginia, granted to plaintiff, Norfolk and Portsmouth Belt Line Railroad Company (hereinafter referred to as "Belt Line" or "carrier"), a temporary injunction directed against the Brotherhood of Railroad Trainmen, Lodge No. 514, the Brotherhood of Locomotive Engineers, Lodge No. 331, the Brotherhood of Locomotive Firemen and Enginemen, Lodge No. 76, and two defendants in their individual capacities and as Local Chairmen of the respective Brotherhoods. The injunction restrained the parties from "calling, ordering, authorizing, encouraging, inducing, approving, continuing, starting, or permitting any strike or collective work stoppage" on the Belt Line, and further restrained defendants from "in any manner interfering with, inducing, or endeavoring to induce, any person employed by the complainant (Belt Line) to interfere with the performance by any employee of said complainant (Belt Line) of his work and duties, and from, in any manner, endeavoring to induce such employee to desist from performance of his regular duties." The original injunction having expired prior to the rendition of this opinion, it was continued in effect by this Court on appropriate motion.

In accordance with the laws of Virginia the injunction was granted by the state court *ex parte*. The defendants have removed the action to this Court.

The ultimate question turns upon the validity of the threatened strike under the facts of this case. If the defendants were lawfully entitled to call for the work stoppage as of September 26, 1956, the injunction must be dissolved. If otherwise, the injunction must remain in effect at least pending further proceedings from an administrative standpoint.

Many of the essential facts are not in dispute. The carrier is a switching terminal railroad maintaining and operating yards in what may be described as Port Norfolk and Berkley. The Brotherhoods, all unincorporated associations and subordinate lodges of national organizations, serve as collective bargaining agents for their respective members, and, as such, are labor organizations and representatives within the meaning of the Railway Labor Act, 45 U.S.C., §151 *et seq.* The carrier owns tracks within the Cities of Portsmouth, South Norfolk and Norfolk, as well as in the County of Norfolk. It has also obtained certain operating rights over portions of the tracks of the Norfolk Southern Railway and Virginian Railway. It renders interchange service to nine railroads serving this area, and directly serves many large and vitally important industries, including the Norfolk Naval Shipyard and the United States Army Base. Suffice it to say that a work stoppage on the line of the carrier would cause irreparable damage to the carrier and to the public. It would substantially paralyze industry in the area involved.

The foundation of this controversy lies in the carrier's change of location for starting and relieving its crews. For many years the carrier has been starting and relieving its crews in two localities, one at Sewells Point in the northern end of the City of Norfolk, and the other at Port Norfolk which is located in the City of Portsmouth. In 1941 the carrier designated Money Point, a section of Norfolk County devoted largely to substantial industries, including the manufacture of fertilizer, as a place for going on and off duty. The employees so designated and required to travel to and from Money Point filed claims for time compensation in traveling and reimbursement for expenses. These claims were handled "on the property"

and finally denied by the President of the carrier line. The claims were *not* taken to the National Railroad Adjustment Board, First Division, and the Money Point reporting station was thereafter abolished the following year.

The so-called Berkley yard is the hub of the wheel. Trains going to Sewells Point and Port Norfolk pass through the Berkley yard but thereafter travel in divergent directions. As the carrier has heretofore used steam locomotives, it was necessary to service the same at the end of each shift or tour of duty. Steam locomotives working in and out of the Berkley yard were returned to Port Norfolk for such servicing. For these reasons, the crew members operating trains in and out of the Berkley yard reported on and off duty at Port Norfolk, and rode on company time between the respective points on the locomotive which, on many occasions, traveled "light."

During the latter part of 1955 and early 1956, the carrier concluded to use Diesel locomotives in substitution for steam. The economy of the new operation is not seriously contested but, by reason of this change, it would no longer be necessary to return the locomotives from the Berkley yard to Port Norfolk for servicing. To accommodate its crews the carrier erected, at the Berkley yard, a new building equipped with lockers, shower baths, toilets, etc. It also provided sufficient parking space for the employees who desired to travel to and from work by private automobiles.

It should be noted that, for many years, the carrier has provided free transportation on carrier's time from Port Norfolk to the Ford plant, to Money Point, and, in isolated instances, to the Berkley yard; such transportation being generally by station wagon owned by the

carrier. As to the Ford Plant, this became necessary by reason of the Plant's activities requiring the immediate removal of an assembled automobile so as not to impede the output. To cause a break in time for a locomotive to go from the Ford Plant to Port Norfolk for the purpose of picking up a new crew, and thereafter return to the Ford Plant, would seriously disrupt plant operations. With reference to Money Point, the necessity for this practice arises only during the seasonal months when the fertilizer plants concentrated in that area are operating at full capacity. Transportation by station wagon to and from the Berkley yard is occasioned by emergencies, including the breakdown of a locomotive. The Court does not lend too much emphasis on the practices mentioned in this paragraph.

Having heard rumors to the effect that a change in the reporting relief points was contemplated, the respective Chairmen of the Brotherhoods addressed a letter to the President of the Belt Line, dated November 25, 1955, and referred to under paragraph 11(a) of the answer, said letter having been introduced in evidence by stipulation of counsel. Stating the employees' position, it is said:

> "It is the employees position that through many years of custom, practice and acquiescence, Port Norfolk, and Sewells Point have become firmly established as the two points where Norfolk & Portsmouth Belt Line crews can be required to report for and be relieved from duty. The employees of the Norfolk and Portsmouth Belt Line have established themselves in neighborhoods convenient to these established places of reporting and relief and it would be manifestly unfair for the company to deprive them of the benefits of such an arrangement by arbitrarily creating an additional reporting and relief point for yard crews at Berkley yard.

> "It is the employees further position that any change in the present arrangement where yard crews report and are relieved at Port Norfolk or Sewells Point will have to be made either by mutual consent or in accordance with the provisions of the Railway Labor Act, as amended."

Undoubtedly the wording of this letter created some feeling between the carrier and the representatives. It is certainly the prerogative of management to change the designated reporting points, but it is equally the prerogative of the employees to insist upon negotiation in matters involving "conditions of employment" and, in the event negotiations fail, the right to strike remains inviolate.

There are approximately twenty-five to thirty men who have heretofore been reporting at Port Norfolk and who, since the granting of the temporary injunction, are reporting and being relieved at the Berkley yard contrary to their wishes. Additionally, the evidence discloses that all employees within the units represented are now reporting as directed by the carrier, all of which is under protest as the employees would have gone out on strike but for the injunction. Included among the estimated twenty-five to thirty men previously reporting at Port Norfolk are eight men living in Norfolk, and undoubtedly it is far more convenient and less expensive for these men to report and be relieved at the Berkley Yard. Furthermore, there are eight men living in Port Norfolk who have heretofore been regularly reporting at Sewells Point. As to these men, if their seniority permits them to secure the new jobs created in the Berkley yard, it is certainly more convenient and less expensive for them to report to the Berkley yard. It appears, therefore, that there are approximately nine to fourteen employees (depending upon seasonal variations) who may be directly and adversely affected by the change to the Berkley yard.

By public conveyance the average time required for travel from Port Norfolk to Berkley, via toll tunnel, is one hour and ten minutes, with an expense of 42c each way. In the majority of instances, however, men use private automobiles.

The shortest route in time and distance, by private automobile, from the Port Norfolk yard office to the Berkley yard office, is through the toll tunnel involving an expense of 30c per trip for car and driver, plus 5c for each passenger, and a distance of 4½ miles each way. Via the toll bridge, known as the Jordan Bridge, the distance is approximately six miles, and the toll is 35c per round trip for car and driver, plus 5c each way for each additional passenger. The third alternative route is toll free but this requires an estimated 12 miles of travel one way. There are no tolls between Sewells Point and Berkley and any employee heretofore living in Norfolk and reporting at Port Norfolk would save a toll charge and approximately three miles of travel by reporting to the Berkley yard. Despite these apparent advantages to many of the employees, the answer to the ultimate question does not lie within the scope of such benefits.

The carrier did not immediately respond to the letter of November 25, 1955, due to the fact that its plans had not fully materialized. On February 9, 1956, the President of carrier requested a meeting in his office on the following day. The representatives attended this meeting at which time a letter, dated February 10, 1956, was delivered to them, signed by the President. In part, the letter states:

> "It should be distinctly understood, however, that this conference is not to be construed as being held for the purpose of negotiations in connection

with the matter under consideration and will be held without prejudice regarding the positions of all concerned.

"No formal notice of any changes in the company's plans has been given to any organization representing its employees since such change in plans will depend on operating conditions and will be made in accordance with the provision of the current agreements with the various organizations representing this company's employees. Therefore, no formal notice of any proposed changes in the company's program of operations is required."

After making reference to the various provisions of the several agreements relating to "point for beginning and ending day," the letter continues:

"From the above, it will be noted that the point for going on and off duty will be governed by local conditions and that this point is not fixed as to specific location and does not necessarily have to remain the same for any specified period of time. It is, therefore, subject to change by the management of this company and is governed by local conditions which is determined by operating requirements at the management's discretion in accordance with the article referred to above."

* * * * * * * * * * * * * * *

"In view of the articles referred to above, there is no restriction placed on this company which prevents it from establishing additional reporting and relief points for its crews, nor is there any requirement that if these points are established this must be done by either mutual consent or in accordance with the Railway Labor Act, as amended."

In the essence, the provisions in the Schedule of Rates, Rules, and Regulations, effective December 1,

1941, are the same with each class of employees involved herein. An example is here quoted as to Conductors and Brakemen under Article VI:

> "(a) Yard crews shall have a designated point for going on duty and a designated point for going off duty.
>
> "(b) The point for going on and off duty will be governed by local conditions. In certain localities instructions will provide that yardmen will report at the hump, others report at yard office, others at engine houses or ready tracks. It is not considered that the place to report will be confined to any definite number of feet, but the designation will be to indicate a definite and recognized location."

At the conference of February 10 the President stated that he would not entertain any conference for the purpose of negotiating changes in working conditions, all of which is apparent from the tenor of his letter. No further "on the property" conferences transpired at that time. The Brotherhoods endeavored to secure the services of the National Mediation Board but, by letter dated March 5, 1956, the Board declined to docket the application at that time. Thereafter, on April 26, 1956, the carrier notified its employees by appropriate bulletins and advertisements that the contemplated change would be effective on May 2, 1956, and that commencing that day six of its thirty-four crews would be required to go on and off duty at the Berkley yard. The carrier invited bids on the new assignments in accordance with seniority rules.

The Brotherhoods forthwith called a general work stoppage effective May 2, 1956. Its representatives notified the National Mediation Board, which body, acting under §5, First (b) of the Railway Labor Act, 45 U.S.C.

§155, First (b), proffered its services. The parties thereupon agreed to allow all matters to remain in *statu quo* pending efforts of the Board to settle the controversy. Two mediators successively visited Norfolk and discussed the matter with the parties but without success. While the Court excluded the details of any "on property" conferences, as well as details of negotiations thereafter in Washington, it is abundantly clear that the general subject of discussion was the travel time and expense involved by reason of the proposed change. Whatever may have been the original intent of the Brotherhoods to insist that the change in reporting place could not be effected without their consent, this contention, if ever proposed, was quickly abandoned. The right to make the change is conceded, but the Brotherhoods insist upon the right to negotiate with respect to any hardships created by such a change and, in view of the ultimate failure of negotiations, exercised its power to call a strike.

Subsequent negotiations before the National Mediation Board at Washington, D. C., similarly resulted in a failure of any agreement. A Mediation Agreement and Proposal was suggested by the Board, agreed to by the Brotherhoods, but rejected by the carrier; all of which was clearly within the carrier's prerogative. The Board, by letter dated July 30, 1956, made reference to other alternative procedures, including the availability of the National Railroad Adjustment Board or the creation, by agreement, of a special or system board of adjustment under the provisions of Sec. 3, Second, of the Railway Labor Act. The carrier responded to this letter stating its position that the disagreement was a matter properly referable to the National Railroad Adjustment Board, First Division. Indeed, the carrier now insists that the National Adjustment Board must consider and act upon

the matter before the Brotherhoods may exercise the right to strike. Upon receiving the carrier's letter as summarized above, the Mediation Board, by telegram dated August 16, 1956, terminated its mediation efforts and closed its file, after having first been advised by the Brotherhoods that they were not agreeable to referring the dispute to the National Railroad Adjustment Board, or to a special board of adjustment. The Brotherhoods insist that the issue involved is one for negotiation, and, when negotiations fail, the right to strike exists.

The record does not indicate that either party offered to arbitrate the matter under 45 U.S.C. §155, Third.

After waiting a period of thirty (30) days, the carrier posted a notice on September 21, 1956, to be effective at 7:00 A.M. on September 26, 1956, that the Port Norfolk reporting station would be abolished, and inviting bids for the new jobs at the Berkley yard. Three (3) days later the Brotherhoods notified the carrier that a strike had been called effective 7:00 A.M. on September 26, 1956. The State court injunction was then granted to the carrier.

The wording of the agreements between the carrier and the Brotherhoods is substantially identical to many other similar agreements which have been the subject of labor disputes of this nature. It is significant that, in the vast majority of cases considered by the National Railroad Adjustment Board, First Division, carriers have insisted that the matter now in controversy is classified under the heading of rules, rates of pay or working conditions, and that the National Railroad Adjustment Board is without jurisdiction. While the Adjustment Board has universally stated that it has jurisdiction over the dispute, the claims have been disposed of by a terse statement similar to the following:

"This dispute comes before the Division on the question of the reasonableness of designated point for going on and off duty, the determination of which is a matter for negotiation and the Division so holds."

For reference to the foregoing, see:

1. Award No. 10603, Docket No. 15422 (5/22/45)
2. Award No. 12035, Docket No. 15683 (3/23/48)
3. Award No. 14941, Docket No. 23829 (11/15/51)

In the instant case the carrier not only insists that the Adjustment Board has jurisdiction, but also contends that the individual employees must report at and be relieved from duty at the Berkley yard against their will and thereafter file and process their claims "on the property" and then through the Adjustment Board as a condition precedent to going out on strike. Counsel stated in oral argument that the time required for processing such matters may be as much as four to five years due to the condition of the docket of the National Railroad Adjustment Board, First Division. It would certainly be futile to proceed in such a manner and then be met with a brief statement to the effect that the matter was *one for negotiation*. Furthermore, the employees had filed no claims at the time of the issuance of the injunction and presumedly have filed none since that date. While the carrier had not submitted the matter in controversy to the Adjustment Board as of the date of the injunction, the Court has been verbally advised that, since the time of argument, the carrier has presented something to this Board, the details of which are not material to a determination of the carrier's right to an injunction.

As heretofore noted the carrier has established a practice, custom and usage of reporting on and off duty at the Port Norfolk yard. It has provided transportation

on carrier's time and expense via steam locomotive. Conceding that the carrier had an absolute right to designate the Berkley yard as a reporting and relief point, does this not constitute a change in working conditions which is the proper subject of negotiation? That the parties did negotiate as to the alleged hardships arising by reason of the contemplated change can hardly be questioned. If the controversy is one which is truly the subject of negotiation, it may, of course, be settled only by a voluntary agreement between the parties. Management's inherent right to designate a change of locality for reporting and relief does not, in and of itself, exclude labor's right to demand that hardships arising therefrom be negotiated and, in the event of failure along these lines, to call for a work stoppage. Courts are not empowered to force the parties to enter into contractual agreements.

Under the provisions of §2, Seventh, of the Railway Labor Act, 45 U.S.C. §152, Seventh, it is said:

> "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreement except in the manner prescribed in such agreements or in §6 (45 U.S.C. §156) of this Act."

In the same section under "Tenth", it is provided:

> "That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent."

When we turn to §6 (45 U.S.C. §156), we find:

> "Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

Technically at least, no official notice was given of any intended change in agreements pursuant to §6. The carrier has consistently taken the position that no such notice was necessary on its part. As heretofore noted, however, the alleged hardships arising from the contemplated change involving travel time and expense were the subject of negotiation before the Mediation Board and it is apparent that a supplemental agreement covering these alleged hardships was sought by the Brotherhoods. In this respect the present controversy differs from *New York Central R. R. Co.* v. *Brotherhood of Rail. Train.*, D. C. Ohio, 140 F. Supp. 273, decided May 1, 1956, which, at first blush, would appear to be a parallel case. In *New York Central* it is not contended that any practice, usage or custom had been established by the carrier wherein

transportation had been provided on carrier's time to and from the actual place of work. It is further stated that New York Central was at all times ready and willing to discuss, negotiate, mediate or arbitrate the problems growing out of the reallocation of work of the 35 employees involved by the change of yards. *New York Central* concerns only the positive assertion by the Brotherhoods that management may not make such changes without opening the avenue to further concessions totally aside from the hardships, if any, which may arise to the employees directly involved. In the instant case we have a practice, usage and custom established by the carrier which was about to be changed, with a reluctance on carrier's part to negotiate on the problems arising therefrom. Indeed, as defendants point out, there would be no occasion to negotiate the issues of "continuous time and transportation expense" unless defendants conceded that the carrier had the inherent right to make the change.

The intent and purpose of §6 of the Act is to fix a procedure for the commencement of conferences relative to changes in the agreement. The section was not intended as a restriction of the bargaining agent or a requirement of personal notice to employees. *McMullans v. Kansas, Oklahoma & Gulf Rwy. Co.*, 10 Cir., 229 F. (2d) 50, certiorari denied, 351 U.S. 918. It can certainly be waived by the affirmative act of the parties when they have negotiated and failed to reach an agreement.

It is apparent that there is jurisdiction vested in the Adjustment Board under 45 U.S.C. §153, First (i), to consider disputes between employees and carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, conditioned that the disputes are first handled in the usual manner up to and including the

carrier's chief operating officer; but, if the parties fail to adjust their differences in that manner, the disputes *may* be referred to the Adjustment Board by the petition of the parties or either party. The law does not make it mandatory that such disputes concerning rates of pay, rules, or working conditions be referred to said Board.

From the foregoing it appears to this Court that the circumstances surrounding this dispute fall within the classification of a "major" dispute in law. To a limited extent it may be trivial, but it is distinguished from mere "grievances" which must go to the Adjustment Board. *Hughes Tool Co.* v. *National Labor Relations Board*, 5 Cir., 147 F. (2d) 69.

This brings into focus the recent apparently conflicting decisions from the Fifth Circuit in *Brotherhood of Railroad Tran.* v. *Central of Ga. Ry. Co.*, 5 Cir., 229 F. (2d) 901, and the Seventh Circuit in *Chicago River & Indiana R. Co.* v. *Brotherhood of Rail. T.*, 7 Cir., 229 F. (2d) 926. Certiorari was granted by the United States Supreme Court in each of these cases on October 16, 1956. The ultimate decision by the Supreme Court may (but not necessarily so) clarify the existing confusion, but it would be improper for this Court to await same which may not be determined for many months. The issue in the cited cases turns upon the applicability of the Norris-LaGuardia Act, 29 U.S.C. §101-115; to Fifth Circuit, by a majority opinion, holding that the Act applied; with the Seventh Circuit ruling to the contrary. A portion of the Norris-LaGuardia Act provides (29 U.S.C. §108):

> "No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has

> failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

In *Trainmen* v. *Toledo P. & W. R. Co.*, 321 U. S. 50, 64 S. Ct. 413, 88 L. Ed. 534, Justice Rutledge delivered the unanimous opinion of the Court in holding that the Norris-LaGuardia Act required, as a prerequisite to the granting of an injunction, the exhaustion of the alternatives afforded by the Act and said:

> "It (the Act) sought to make injunction a last line of defense, available not only after other legally required methods, but all all reasonable methods as well, have been tried and found wanting.
>
> * * * * * * * * * * * * * * * * *
>
> "Obviously, if the view of the Court of Appeals is right, the condition requiring 'every reasonable effort to settle' the dispute becomes a dead letter in railway labor disputes, since no more would be required by its terms in that application than is called for by the first condition which demands compliance with legal obligations. Respondent, however, while apparently agreeing with the Court of Appeals that compliance with one method is sufficient, relies not only upon its negotiation, but also upon its participation in mediation. This serves it in no better stead. The section is not disjunctive as to arbitration, but conjunctive as to negotiation and mediation. The case is one, so far as both language and policy, go, of one or all."

Holding in the instant case that the matters in dispute are proper subjects of negotiation, that the parties have negotiated to no avail, that further compliance with §6 of the Railway Labor Act is unnecessary in view of

prior failure of negotiations, that neither party has requested arbitration, that it is not incumbent upon defendants to resort to the Adjustment Board as a condition precedent to calling a strike, and that the carrier has not exhausted its efforts to arbitrate the matter voluntarily, the Court arrives at the conclusion that the employees were legally within their rights in calling for work stoppage effective September 26, 1956, and the injunction must be dissolved.

Counsel for defendants will prepare an order to this effect, adopting this opinion as the Court's findings of fact and conclusions of law, which, after presentation to opposing counsel for inspection, shall be submitted to the Court for entry. The order shall include provision for the dismissal of this action as to Brotherhood of Locomotive Engineers, Lodge No. 331, which defendant was dismissed by agreement of counsel at the time of oral argument. Contemporaneously with the entry of an order dissolving the injunction, the Court will entertain a motion to reinstate the same upon the filing of a notice of appeal from the order of this Court. The disastrous circumstances resulting from a strike justify such action by the Court pending a final determination of the interesting legal questions by the appellate court.

(Sgd.) WALTER E. HOFFMAN,
United States District Judge

Norfolk, Virginia
January 25, 1957

JUDGMENT OF FEBRUARY 8, 1957, FROM WHICH APPEAL IS TAKEN

This day came the parties by counsel to again be heard on the pleadings herein filed, the evidence heard ore tenus, the exhibits filed, and the findings of fact and conclusions of law contained in the Court's Opinion heretofore filed on January 25, 1957, and,

It appearing to the Court that the Brotherhood of Locomotive Engineers Lodge No. 331 has never been served with process, and counsel for all parties having agreed that the Court is without jurisdiction over the person of said Brotherhood, it is

ORDERED that the Brotherhood of Locomotive Engineers, Lodge No. 331, be and it hereby is dismissed as a party defendant in this cause; and,

It further appearing to the Court after a full hearing of this cause on the merits and for the reasons set forth in its Opinion herein on January 25, 1957, that the temporary injunction granted by the Circuit Court of the City of Norfolk, Virginia, on September 24, 1956, and extended by order of this Court on December 20, 1956, should be dissolved, it is

ORDERED that said temporary injunction, be and it hereby is dissolved, and the Court doth adopt as findings of fact and conclusions of law the Court's Opinion of January 25, 1957, and doth further order that the defendants recover their costs of the complainant.

JUDGMENT CONTINUING INJUNCTION IN EFFECT PENDING OUTCOME OF APPEAL

It appearing to the Court that since the entry of the judgment of this date dissolving the temporary injunction heretofore granted and extended, the plaintiff has filed notice of an appeal from said judgment to the United States Court of Appeals for the Fourth Circuit in accordance with Rule 73 F.R.C.P. and after due notice to the defendants has moved the Court to suspend the execution of said judgment or to grant a new injunction to the same effect during the pendency of its appeal in accordance with Rule 62 F.R.C.P., and said plaintiff having heretofore given a bond in the penalty of $10,000.00 with surety approved by the Clerk of this Court, conditioned for the payment of such costs and damages as may be incurred and suffered by any party who is found to have been wrongfully enjoined or restrained, which bond is still in full force and effect, and the Court being advised of the disastrous effect upon the community of a general strike or work stoppage by the defendants, it is

ADJUDGED and ORDERED that the execution of the judgment entered this day dissolving the temporary injunction be and the same hereby is suspended until the disposition of said appeal by the United States Court of Appeals for the Fourth Circuit, and during said period the said injunction heretofore granted shall remain in full force and effect.

Signed WALTER E. HOFFMAN,
United States District Judge

Norfolk, Virginia
February 8, 1957.

Letter from Defendants to Plaintiffs

November 25, 1955

"It is our understanding that plans are being made to change the reporting and relief point for certain yard crews from Port Norfolk to Berkley yard when Diesel power is put into service on the Belt Line.

"While we have received no formal notice of such change, the construction of new wash and locker room facilities at Berkley yard lends substance to the rumors being circulated about the property and convinces us that the changes are contemplated.

"Under these circumstances we think it proper that you be advised of the employees position concerning changes of this kind, so you will have the benefit of this information before the contemplated change becomes effective. It is for that purpose that this letter is being written.

"It is the employees position that through many years of custom, practice and acquiescence, Port Norfolk and Sewells Point have become firmly established as the two points where Norfolk & Portsmouth Belt Line crews can be required to report for and be relieved from duty. The employees of the Norfolk and Portsmouth Belt Line have established themselves in neighborhoods convenient to these established places of reporting and relief and it would be manifestly unfair for the company to deprive them of the benefits of such arrangements by arbitrarily creating an additional reporting and relief point for yard crews at Berkley yard.

"It is the employees further position that any change in the present arrangement where yard crews report and are relieved at Port Norfolk or Sewells Point will have to be made either by mutual consent or in accordance with the provisions of the Railway Labor Act, as amended."

Letter from Plaintiff to Defendants

February 10, 1956

"This will acknowledge letter dated November 25, 1955, signed by Mr. I. M. Barrick, General Chairman, Brotherhood of Locomotive Engineers; Mr. J. W. Hayes, General Chairman, Brotherhood of Railroad Trainmen; and Mr. C. W. Mathews, General Chairman, Brotherhood of Locomotive Firemen and Enginemen, stating that it is your understanding that plans are being made to change the reporting and relief point for certain yard crews from Port Norfolk to Berkley Yard when diesel power is put into service on the Belt Line.

"Acknowledgment of this letter has been deferred pending the further development of this Company's plans in connection with its Dieselization Program.

"In order to possibly arrive at a bettter understanding of the matter, I requested our Mr. J. L. Jones, Trainmaster and Road Foreman of Engines, to arrange with you for conference in my office at 2:30 P.M. Friday, February 10, 1956, in order to discuss it. He advised me that you will be present.

"It should be distinctly understood, however, that this conference is not to be construed as being held for the purpose of negotiations in connection with the matter under consideration and will be held without prejudice regarding the positions of all concerned.

"No formal notice of any changes in the company's plans has been given to any organization representing its employees since such change in plans will depend on operating conditions and will be made in accordance with the provision of the current agreements with the various organizations representing this company's employees. Therefore, no formal notice of any changes in the company's program of operations is required.

"It is a fact that new wash and locker room facilities are being constructed adjacent to this company's yard

office in Berkley yard and will be ready for use in the near future.

"In regard to the employees' position relative to the change in reporting and relief point for its crews, this matter is completely covered in Schedule of Rates, Rules and Regulations effective December 1, 1941, as follows:

"ENGINEERS—ARTICLE VII—POINT FOR BEGINNING AND ENDING DAY

'(a) Provisions of existing rules that there shall be a specified point for either going on or off duty, or both, are not affected by anything herein; but schedules having no such rules shall be modified to provide that yard crews shall have a designated point for going on duty and a designated point for going off duty.

'(b) The point for going on and off duty will be governed by local conditions. In certain localities instructions will provide that engine crews will report at the hump, others report at yard office, others at engine houses, or ready tracks. It is not considered that the place to report will be confined to any definite number of feet, but the designation will indicate a definite and recognized location.'

FIREMEN AND HOSTLERS—ARTICLE VII—POINT FOR BEGINNING AND ENDING DAY

'(a) Provisions of existing rules that there shall be a specified point for either going on or off duty, or both, are not affected by anything herein; but schedules having no such rules shall be modified to provide that yard crews shall have a designated point for going on duty and a designated point for going off duty.

'(b) The point for going on and off duty will be governed by local conditions. In certain localities instructions will provide that engine crews will report at the hump, others report at yard office, others at engine houses, or ready tracks. It is not considered that the place to report will

be confined to any definite number of feet, but the designation will indicate a definite and recognized location.'

CONDUCTORS AND BRAKEMEN—ARTICLE VI—POINTS FOR BEGINNING AND ENDING DAY

'(a) Yard crews shall have a designated point for going on duty and a designated point for going off duty.

'(b) The point for going on and off duty will be governed by local conditions. In certain localities instructions will provide that yardmen will report at the hump, others report at yard office, others at engine houses or ready tracks. It is not considered that the place to report will be confined to any definite number of feet, but the designation will be to indicate a definite and recognized location.'

"From the above, it will be noted that the point for going on and off duty will be governed by local conditions and that this point is not fixed as to specific location and does not necessarily have to remain the same for any specified period of time. It is, therefore, subject to change by the management of this company and is governed by local conditions which is determined by operating requirements at the management's discretion in accordance with the article referred to above.

"Changes governed by local conditions as a result of changed operating requirements and improved type of motive power determine the point at which crews should begin and end their days' assignment. The fact that Port Norfolk and Sewells Point have been designated as the two points where this company's crews report for and are relieved from duty does not restrict the company from designating an additional point or points governed by local conditions at which its crews shall report for and be relieved from duty.

"The management of this company does not desire to in any way work a hardship on its employees but it should be perfectly obvious that it can not restrict its operations by not increasing the number of points at

which its crews report for and are relieved from duty simply because some of its employees have established themselves in neighborhoods more convenient to the existing points for reporting to and being relieved from duty.

"This company does not agree with the statement that it is *manifestly unfair* for it to deprive its employees of the benefits which may be derived from their having established themselves in convenient neighborhoods nor has it *arbitrarily* created an additional reporting and relieving point for yard crews at Berkley yard since the article referred to above clearly sets forth the company's right to establish additional reporting and relief points.

"Relative to the employees further position that any change in the present arrangement where yard crews report and are relieved at Port Norfolk or Sewells Point will have to be made either by mutual consent or in accordance with the provisions of the Railway Labor Act, as amended.

"In view of the articles referred to above, there is no restriction placed on this company which prevents it from establishing additional reporting and relief points for its crews, nor is there any requirement that if these points are established this must be done by either mutual consent or in accordance with the Railway Labor Act, as amended.

"The articles referred to above are very specific in language and were intended for the purpose of permitting the company to change or add to the number of points at which its crews are to report and be relieved from duty, governed by local conditions."

Letter from Defendants to Plaintiff

February 13, 1956

"This will acknowledge your joint letter of February 10, 1956, which was in reply to ours of November 25, 1955,

concerning the company's plans to change the place of reporting and relief for certain yard crews from Port Norfolk and Sewells Point to Berkley Yard when diesel power is put into service on the Belt Line.

"We have noted your position concerning this contemplated change, and particularly your position that under the provisions of Articles VII of the B. of L. E. and B. of L. F. & E. contracts and Article VI of the B. R. T. contract such change is 'governed by local conditions which is determined by operating requirements at the Managements' discretion.'

"We doubless erred in our previous letter when we referred to the contemplated change as simply a change in the *point* where crews are to report and be relieved. We should have called your attention to the fact that the change will amount to a change in both the *point* and the *locality* at which these drews have traditionally reported and been relieved.

"A careful reading of the rules you have referred to, reveals that they refer to 'points,' ie, definite positions, and 'localities,' ie, areas or regions. We concede that the Company has a right under these rules to designate the point within the area or region of Port Norfolk or Sewells Point Yards where the employees we represent will be required to report and be relieved, so long as such designation does not work a hardship upon them, or result in a hazardous situation. We deny, however, that the company has the right under these or any other rules to require these men to report and be relieved at Berkley Yard—a new locality far removed from Port Norfolk and Sewells Point, and of difficult access to the employees without the benefit of agreements negotiated in accordance with the terms of the Railway Labor Act. But regardless of the rules upon which you base your position or the language by which the contemplated change might be described, the effect is that of establishing a new crew terminal by transferring a portion of the functions now performed at Port Norfolk or Sewells Point to Berkley Yard, and we feel quite strongly that when the Company

undertakes to make such change in a manner other than by mutual consent, or in accordance with the provisions of Section 6 of the Railway Labor Act, they are undertaking to change the working conditions of their employees, as a class as embodied in agreements, which action we consider to be in direct violation of Section 2, Seventh of the Act.

"We think you will upon further consideration and a careful reading of the rules you are relying upon come to the conclusion that our position in this matter is sound. We earnestly hope you will bring yourself to that point of view. And we assure you that should you do so, you will have our fullest cooperation in reaching agreements which will be fair and equitable to both the Company and its employees."

Telegram from defendants to Mr. E. C. Thompson, Secretary, National Mediation Board, Washington, D. C., February 13, 1956.

"Serious situation existing on Norfolk Portsmouth Belt Line Railroad as the result of management arbitrarily moving the terminal from Port Norfolk to Berkley, a distance of approximately six miles, without negotiating with committees. Request your board take immediate jurisdiction and notify carrier to hold matter status quo pending mediation proceedings. Letter follows."

Telegram from Mediation Board to Plaintiff

1956 Feb. 13 PM 5·12

"FOLLOWING WIRE RECEIVED DATE FROM CHIEF EXECUTIVE BLE, BLFE, BRT QUOTE SERIOUS SITUATION EXISTING ON NORFOLK AND PORTSMOUTH BELT LINE RAILROAD AS THE RESULT OF MANAGEMENT ARBITRARILY MOVING TERMINAL FROM PORT NORFOLK TO BERKLEY A DISTANCE OF APPROXIMATELY

SIX MILES WITHOUT NEGOTIATING WITH COMMITTEES REQUEST YOUR BOARD TAKE IMMEDIATE JURISDICTION AND NOTIFY CARRIER TO HOLD MATTER STATUS QUO PENDING MEDIATION PROCEEDINGS LETTER FOLLOWS UNQUOTE PLEASE WIRE STATEMENT.

Letter from Mediation Board to parties:

March 5, 1956

"Reference is made to exchange of correspondence in connection with application for mediation dated February 14, 1956 from the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen and the Brotherhood of Railroad Trainmen in a dispute between those Organizations and the Norfolk & Portsmouth Belt Line Railroad Company on the following subject:

> 'Carrier arbitrarily moving terminal from Port Norfolk to Berkley a distance of approximately six miles without negotiating with the committees.'

"As stated in our letter of February 17, 1956 to Messrs. Brown, Gilbert and Kennedy, with copy to Mr. White, we are informed by the Carrier that they have not moved the terminal from Port Norfolk to Berkley, Virginia as stated in the application. On the other hand the situation appears to be that the Carrier proposes to establish a new point for certain crews to go on and off duty at Berkley Yard in connection with the dieselization of the motive power of this Company.

"The file was considered by the Board in executive session on March 2, 1956, and it is the Board's opinion that there is no basis for docketing the application for mediation on the subject described therein.

"However, as you were advised in our letter of February 17th, the dispute has been given our corre-

spondence File C-2446 and Mediator Lohm will be in Norfolk tomorrow, March 6th, for the purpose of meeting the parties in an endeavor to work out some solution to this controversy."

Letter from Mediation Board to parties:

July 30, 1956
Case No. E-29

"Reference is made to our File No. E-29 which covers a dispute between the Norfolk & Portsmouth Belt Line Railroad Company, the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, and the Brotherhood of Railroad Trainmen on the subject of proposed assignment of certain yard crews to commence their tour of duty at the Berkley Yard in the Norfolk switching area.

"This Board proffered its mediation services in this dispute on April 27, 1956 under the provisions of Section 5, First (b) of the Railway Labor Act, which states in part:

> '* * * * The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.'

"This proffer of mediation was made after the organizations named above had notified this Board that authority had been granted to withdraw the employees they represented from the carrier's service at 7 A.M., Wednesday, May 2, 1956.

"Mediation proceedings were conducted with the assistance of Mediator Robert Roadley and Board Member Edwards, ending on July 24, 1956. A tentative agreement was reached as the result of mediation by Board Member Edwards. This agreement having been executed for the organizations by Mr. J. W. Turner, Assistant Grand Chief Engineer, Brotherhood of Locomotive

Engineers, Mr. M. L. Mellett, Acting Vice President, Brotherhood of Locomotive Firemen and Enginemen, and Mr. W. T. Jenkins, Deputy President, Brotherhood of Railroad Trainmen, subject to acceptance and execution on the part of the carrier.

'We are now in receipt of the following letter from Mr. H. L. White, Jr., President and General Manager of the Norfolk & Portsmouth Belt Line Railroad Company dated July 25th in which the carrier rejects the Mediation Agreement and proposals. The letter reads as follows:

> 'Please refer to letter from Mr. Leverett Edwards to me of July 24, 1956, NMB Case E-29, in regard to Mediation Agreement and Proposal.
>
> 'In compliance with Mr. Edwards' request that I advise you concerning this Company's decision in regard to the Agreement, I wish to advise that after full consideration of this matter it is with a great deal of regret I must inform you that the Norfolk and Portsmouth Belt Line Railroad Company rejects the Mediation Agreement and Proposal.
>
> 'I am exceedingly sorry that this matter could not be satisfactorily settled, and personally and on behalf of the Management of this Company wish to thank you, your Honorable Board and capable staff of Mediators for the exceptionally fine efforts which were made to obtain an Agreement.'

"In view of this action of the Carrier, copies of the proposed agreement, executed by the organizations representatives and now held in escrow by the undersigned, are being destroyed in accordance with Board Member Edwards' letter to Messrs. Turner, Mellett and Jenkins of July 24, 1956.

"The Board directs the attention of the parties to the provisions of Section 3 of the Railway Labor Act, under which the National Railroad Adjustment Board was created with full authority to hear and decide on all disputes between carriers and employees growing out of

grievances or interpretations or application of agreements concerning rates of pay, rules or working conditions.

"The National Mediation Board urges the parties to this dispute to either avail themselves promptly of the adjustment machinery of the Adjustment Board or to create, by agreement, a special or system board of adjustment under the provisions of Section 3, Second of the Act, to consider and decide upon the differences between them.

"The National Mediation Board stands ready to render what further assistance may be necessary if the parties agree to this procedure. A prompt reply is requested.

By direction of the NATIONAL MEDIATION BOARD."

SUPREME COURT, U.S.
FILED
NOV 22 1957
JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1957.

No. 622.

BROTHERHOOD OF RAILROAD TRAINMEN, LODGE NO. 514, *et al.*,

Petitioners,

v.

NORFOLK AND PORTSMOUTH BELT LINE RAILROAD CO.,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals, Fourth Circuit.

ROBERT R. MACMILLAN,
621 Bank of Commerce Building,
Norfolk 10, Virginia,

WAYLAND K. SULLIVAN,
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In the Supreme Court of the United States

OCTOBER TERM, 1957.

No. _____.

BROTHERHOOD OF RAILROAD TRAINMEN, LODGE NO. 514, *et al.*,

Petitioners,

v.

NORFOLK AND PORTSMOUTH BELT LINE RAILROAD CO.,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals, Fourth Circuit.

To the Honorables, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners are the Brotherhood of Railroad Trainmen, Lodge No. 514, Foy K. Vaughan, individually and as Local Chairman of such Brotherhood, the Brotherhood of Locomotive Firemen and Enginemen, Lodge No. 76, and C. W. Matthews, individually and as General Chairman of such Brotherhood. The petitioners pray that a writ of certiorari issue to the United States Court of Appeals, Fourth Circuit, to review a judgment of that Court entered in a case entitled *Norfolk and Portsmouth Belt Line Railroad Company v. Brotherhood of Railroad Trainmen, Lodge 415, et al.*, Docket No. 7416, reversing a judgment for the petitioners rendered by the United States District Court for the Eastern District of Virginia, Norfolk Division, and ordering that a permanent injunction be entered against the petitioners.

OPINIONS BELOW.

The opinions rendered by the District Court and by the Court of Appeals, Fourth Circuit, have not as yet been officially or unofficially reported. Copies of these opinions are included in the appendix to this petition.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(1). The judgment of the Court of Appeals was entered on August 23, 1957. A petition for rehearing was filed by the petitioners and was overruled on September 30, 1957.

QUESTIONS PRESENTED.

1. Whether a strike by the employees of a carrier engaged in interstate commerce is lawful when the cause of the strike is a dispute over the interpretation and application of a provision in a collective agreement governing the employees' working conditions.

2. Whether a strike by railway employees, which is lawful when called, may at a later time be converted into an unlawful strike by the act of the carrier-employer submitting the dispute, which led to the strike, to the National Railroad Adjustment Board.

STATUTES INVOLVED.

The provisions of the Railway Labor Act [1] pertinent to the questions presented by this petition are as follows:

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or work-

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[1] 45 U. S. C. Sec. 151, *et seq.*

ing conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes. * * *

The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute." (45 U. S. C. Sec. 153, First (i) and (m)).

STATEMENT OF THE CASE.

The respondent is a switching terminal and belt line railroad serving the industries in the Norfolk, Virginia, area. (Appellant's App., p. 10.) It is engaged in interstate commerce and is subject to the Railway Labor Act. The center of the carrier's lines is the Berkley Yard located in South Norfolk, Virginia. From this yard, branch lines extend in several directions to serve concentrations of industries. One such branch crosses the Elizabeth River to a yard in Portsmouth, Virginia, known as the Port Norfolk Yard.

Prior to 1956 engine crews that were to work at Berkley Yard reported for duty at the Port Norfolk Yard in Portsmouth, where the locomotives were serviced. They then proceeded by locomotive over the lines of the carrier

to Berkley Yard or to other points of work assignment. Normally, the locomotive would be returned by the crew to the Port Norfolk Yard at the end of the work shift. This traveling on the locomotive was at the carrier's expense, as the crew would be on a pay status from the beginning of their starting time at Port Norfolk Yard until they were relieved from duty at the same place. (Appellant's App., pp. 20-21.)

One other place on the respondent's property where crews regularly reported for duty and also ended their round of duty is known as Sewells Point Yard.

The enginemen in the yard crews are represented for the purposes of the Railway Labor Act by the Brotherhood of Locomotive Firemen and Enginemen. The switchmen and other yardmen are represented by the Brotherhood of Railroad Trainmen. The collective agreements between the respondent and the two Brotherhoods provide that the respondent will maintain locker rooms, showers and other facilities at the points where the employees are required to report for duty or be relieved from duty.

Each of the collective agreements also contains a rule which provides, in substance, that there will be certain designated points at which employees will report for duty and be relieved of duty. (Appellant's App., pp. 64-67.) The correct interpretation of these rules became the subject of dispute between the respondent and the Brotherhoods after the respondent had replaced its steam locomotives with Diesel locomotives and then recognized that there would be economic advantages in having the crews which worked in the Berkley Yard report for duty and go off duty at this yard rather than at the Port Norfolk Yard. (Appellant's App., p. 34.) For some members of these crews this change would require them to travel a minimum of ten additional miles daily and also incur the added ex-

pense of furnishing their own transportation. (Appellant's App., pp. 2, 36; Appellees' App., pp. 1, 3, 38-41.)

The Brotherhoods asked the respondent to assume all, or at least part, of the additional burden that would be put upon the employees by changing the place of reporting for duty from Port Norfolk Yard to Berkley Yard. (Appellant's App., p. 36.) The respondent declined the request.

It is unnecessary to detail the positions taken and the arguments urged by the respective parties during the dispute. (Appellant's App., pp. 63-73.) It will suffice to say that the Court of Appeals held that the dispute must be classified as a "minor dispute," as that term is sometimes used in the railway industry, and, hence, referable by either of the parties to the National Railroad Adjustment Board for decision.

The parties were unable to settle their dispute by direct negotiation, and on April 26, 1956, the respondent posted notice on its bulletin board that the place for the reporting and relief of six crews would be changed from Port Norfolk Yard to Berkley Yard effective May 2, 1956. On April 27, 1956, the Brotherhoods notified the National Mediation Board that the employees represented by the Brotherhood would withdraw from service in a general strike on May 2, 1956. The National Mediation Board proffered its mediation services on the grounds that a "labor emergency" [2] was found to exist. (Appellees' App., pp. 8-9.) A mediator arrived on the scene and attempted for several days to bring the parties to agreement, but without success. (Appellant's App., p. 37.)

In July, 1956, the National Mediation Board invited the parties to Washington to continue the mediatory

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[2] 45 U. S. C. Sec. 155, First.

process. (Appellant's App., p. 17.) An agreement settling the dispute was formulated late on July 23, 1956, by the mediator and submitted to the parties. (Appellant's App., p. 23.) The petitioners approved the agreement and signed it on July 24. The respondent's president indicated approval of the language of the agreement but left Washington late on July 24 to return to Norfolk to further consider the terms of the proposed agreement. (Appellant's App., pp. 71-73; Appellees' App., pp. 15-17.) The next day, July 25, the respondent's president advised the Mediation Board that the respondent was rejecting the mediation agreement. (Appellant's App., p. 24.) On August 16, 1956, the Mediation Board advised the parties that it was withdrawing from the case. (Appellant's App., pp. 5, 30.)

More than a month later, on September 21, 1956, the respondent posted notice that effective September 26, 1956, five crews would change their place of reporting for duty and being relieved from duty, from Port Norfolk Yard to Berkley Yard. On September 24, 1956, the Brotherhoods notified the respondent that its employees in switching service would withdraw from service on September 26, 1956. On the same day that the strike notification was given to the respondent, to wit, September 24, 1956, the respondent filed suit in the Circuit Court of the City of Norfolk and obtained an injunction ordering the employees not to strike. The next day the respondent ordered certain of its switching crews to henceforth report for duty at Berkley Yard. The employees complied with this order, in obedience to the injunction. (Appellant's App., pp. 40, 42.) This suit was thereafter removed to the United States District Court for the Eastern District of Virginia, Norfolk Division.

Neither the respondent carrier nor the Brotherhoods had submitted the dispute to the National Railroad Adjust-

ment Board at the time that the respondent went to court on September 24, 1956, and obtained the injunction against its employees.

The trial of this case began in the District Court on October 9, 1956; was continued to October 10, and concluded on that date. Final argument was heard on October 24, 1956. The dispute had not been submitted to the National Railroad Adjustment Board by the latter date.

The case was decided by the District Court on January 25, 1957. Regarding the submission of this dispute to the Adjustment Board, the District Court made the following observation:

> "While the carrier had not submitted the matter in controversy to the Adjustment Board as of the date of the injunction, the Court has been verbally advised that, since the time of argument, the Carrier has presented something to this Board, the details of which are not material to a determination of the carrier's right to an injunction." (Appellant's App., p. 53.)

The District Court held that "the employees were legally within their rights in calling for work stoppage effective September 26, 1956, and the injunction must be dissolved." The injunction was reinstated, however, upon motion by respondent and the filing of its notice of appeal. (Appellant's App., pp. 60-61.)

The Court of Appeals reversed the judgment of the lower court and ordered that the employees be permanently enjoined from striking because of the dispute over the shifting of the place to report for duty.

The core of the reasoning by which the Court of Appeals arrived at the decision that the threatened strike should be permanently enjoined is contained in the following quotations from the Court's opinion:

> "Since the dispute is a minor one subject to final determination by the Adjustment Board, to which it

has been submitted by petition of the carrier, the threatened strike should be enjoined, *Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad Co.*, 353 U. S. 30, 77 S. Ct. 635, 1 L. Ed. 2d 622; *Manion v. Kansas City Terminal Railway Co.*, 353 U. S. 927, 77 S. Ct. 706, 1 L. Ed. 722. * * *

"Since the issue framed and processed by the parties was a 'minor' one, resort by the Brotherhoods to a strike was not lawful and a permanent injunction should be entered."

REASONS FOR GRANTING THE WRIT.

1. The Court of Appeals has decided a Federal question in a way that squarely conflicts with the decision of this Court in the case of Manion v. Kansas City Terminal Railway Co., 353 U. S. 927.

The *Manion* case and the *Chicago River* case[3] presented substantially identical facts to this Court, save for one highly significant difference. This difference was that in the *Chicago River* case, after the dispute had been progressed in conferences up to and including the chief operating officer of the carrier designated to handle such disputes, and after the Mediation Board had assumed jurisdiction of the dispute and had exhausted, without success, its mediatory efforts to bring the parties to agreement, the carrier then made an *ex parte* submission of the dispute to the National Railroad Adjustment Board. The Board docketed the dispute in its usual manner. Four days later the employees elected to strike over the dispute notwithstanding the fact that the Adjustment Board had assumed jurisdiction of the dispute. The dispute was a so-called "minor" dispute, involving the interpretation of a collective agreement.

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[3] *Brotherhood of Railroad Trainmen v. Chicago River & I. R. Co.*, 353 U. S. 30.

The *Manion* case was also concerned with "minor" disputes. The disputes in this case were processed through conferences, and then the National Mediation Board entered upon the scene and tried, without success, to bring the parties to agreement. Neither party desired to submit the disputes to the Adjustment Board. The employees thereafter announced their intention of withdrawing from service until such time as the disputes were satisfactorily settled.

Thus, the one essential fact that differentiated the *Manion* case from the *Chicago River* case is that in the latter case the announced determination by the employees that they were going to strike occurred *after* the Adjustment Board had assumed jurisdiction of the dispute. In the *Manion* case the announced intention to strike was not a threat to the authority of the Adjustment Board. Hence, in the *Manion* case this Court ordered the court below to vacate the injunction issued to restrain the employees from striking. In so ruling this Court rejected the contention so vigorously urged by the carriers that the Congress had taken from railway employees the right to strike when the cause of the strike is a dispute involving the interpretation or application of a collective agreement.

The decision by the Court of Appeals in the instant case is squarely in conflict with the law as enforced in the *Manion* case. *The factual situation that obtained when the respondent in the instant case resorted to the Virginia court for an injunction to interfere with its employees' announced intention to strike is exactly the same as in the Manion case.*

When the Court of Appeals held, in effect, that the submission of a dispute to the Adjustment Board by the carrier, though made long after the right of the employees to strike had matured under Railway Labor Act procedure

and after the employees would have withdrawn from service had they not been stopped by injunction, has the legal effect of converting what began as a lawful strike, into an unlawful strike, this conclusion is contrary to the decision in the *Manion* case. In short, the law as announced by the Court of Appeals is that a strike, though lawful when begun, can be made unlawful by the act of the carrier belatedly submitting the dispute underlying the strike to the Adjustment Board.

When this Court qualified its mandate in the *Manion* case by stating that its order to the Kansas City Court of Appeals to vacate its judgment was without prejudice to the power of the Kansas Court to reinstate the injunction against the employees if the dispute were submitted to the Adjustment Board *within a reasonable time* after the mandate went down, the alternative result under the mandate is clear. This would be that the injunction could *not* be lawfully reinstated if the submission of the dispute were not made *within a reasonable time* after the mandate reached the lower court.

We assume that there would have been no reason for this Court to restrict the power of the lower court to reinstate the injunction, by prescribing that it might be done only if the submission to the Adjustment Board were made within a reasonable time, if the law were as the Court of Appeals assumed it to be in the instant case. We understand that the law as implied and enforced in the *Manion* case does *not* contemplate that a carrier shall have the right to explore the available terms of settlement through negotiation and mediation; then stand by to see whether the employees can muster enough support and strength to mount a successful strike, and if the employees can demonstrate that they have the necessary strength and determination to wage a contest with some prospect of

success, the carrier may thereafter, at its leisure, convert the lawful strike into an unlawful strike by the simple process of making an *ex parte* submission of the dispute to the Adjustment Board.

2. The Court of Appeals has decided an important question of Federal law in a manner that will seriously affect the interests of all railway employees in the United States. This decision, if it stands and is followed by other courts, will destroy the success of the collective bargaining process to the extent that the Railway Labor Act depends upon this process as a means of disposing of "minor" disputes in the railway industry.

No right is more important to the welfare and the progress of organized labor than the right of employees to withhold their labor when relations between the employees and their employer reach a state where striking appears to be a necessary course of action. It is almost a truism to say that true and effective collective bargaining can occur only when the parties are possessed of substantially equal economic strength.

The *Chicago River* and *Manion* cases were the first formal attempts by the carriers during the more than twenty years following the enactment of the 1934 amendments to the Railway Labor Act, to sell the proposition to the courts that Congress outlawed the previously existing right of railway employees to strike over an accumulation of so-called "minor disputes." Since the Congress did not incorporate language in the Railway Labor Act stating that the right to strike over "minor disputes" was being withdrawn from employees, the conclusion contended for by the carriers had to be founded upon the argument that the fact that the Adjustment Board was established with authority to decide "minor disputes" when submitted

by either party to the dispute, must be interpreted as a Congressional determination to take from employees the right to strike in all instances where the dispute leading to the strike comes within the scope of the Adjustment Board's jurisdiction.

This argument was summarily disposed of by the per curiam opinion of this Court in the *Manion* case. The right of employees in the railway industry to strike when a dispute with their employer seems to necessitate such action was thus preserved by this Court, except in the situation presented by the *Chicago River* case. *The right to strike as preserved by the Manion case will be deprived of all practical importance if the decision by the Court of Appeals in the instant case is not overthrown by this Court.* This is true for a reason which we believe will be obvious to the Court. If the right to strike over so-called minor disputes is subject to nullification at any time by the action of the employer submitting the dispute to the Adjustment Board, the right will be without substance. The importance to railway employees of the decision in the *Manion* case will have vanished.

CONCLUSION.

It is respectfully submitted that this petition for a writ of certiorari to the Court of Appeals for the Fourth Circuit should be granted.

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November 23, 1957.

APPENDIX.

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION.

(Dated January 25, 1957.)

On September 24, 1956, the Circuit Court of the City of Norfolk, Virginia, granted to plaintiff, Norfolk and Portsmouth Belt Line Railroad Company (hereinafter referred to as "Belt Line" or "carrier"), a temporary injunction directed against the Brotherhood of Railroad Trainmen, Lodge No. 514, the Brotherhood of Locomotive Engineers, Lodge No. 331, the Brotherhood of Locomotive Firemen and Enginemen, Lodge No. 76, and two defendants in their individual capacities and as local Chairmen of the respective Brotherhoods. The injunction restrained the parties from "calling, ordering, authorizing, encouraging, inducing, approving, continuing, starting, or permitting any strike or collective work stoppage" on the Belt Line, and further restrained defendants from "in any manner interfering with, inducing, or endeavoring to induce, any person employed by the complainant (Belt Line) to interfere with the performance by any employee of said complainant (Belt Line) of his work and duties, and from, in any manner, endeavoring to induce such employee to desist from performance of his regular duties." The original injunction having expired prior to the rendition of this opinion, it was continued in effect by this Court on appropriate motion.

In accordance with the laws of Virginia the injunction was granted by the state court *ex parte*. The defendants have removed the action to this Court.

The ultimate question turns upon the validity of the threatened strike under the facts of this case. If the defendants were lawfully entitled to call for the work stop-

page as of September 26, 1956, the injunction must be dissolved. If otherwise, the injunction must remain in effect, at least pending further proceedings from an administrative standpoint.

Many of the essential facts are not in dispute. The carrier is a switching terminal railroad maintaining and operating yards in what may be described as Port Norfolk and Berkley. The Brotherhoods, all unincorporated associations and subordinate lodges of national organizations, serve as collective bargaining agents for their respective members, and, as such, are labor organizations and representatives within the meaning of the Railway Labor Act, 45 U. S. C., Sec. 151 *et seq*. The carrier owns tracks within the Cities of Portsmouth, South Norfolk and Norfolk, as well as in the County of Norfolk. It has also obtained certain operating rights over portions of the tracks of the Norfolk Southern Railway and Virginian Railway. It renders interchange service to nine railroads serving this area, and directly serves many large and vitally important industries, including the Norfolk Naval Shipyard and the United States Army Base. Suffice it to say that a work stoppage on the line of the carrier would cause irreparable damage to the carrier and to the public. It would substantially paralyze industry in the area involved.

The foundation of this controversy lies in the carrier's change of location for starting and relieving its crews. For many years the carrier has been starting and relieving its crews in two localities, one at Sewells Point in the northern end of the City of Norfolk, and the other at Port Norfolk which is located in the City of Portsmouth. In 1941 the carrier designated Money Point, a section of Norfolk County devoted largely to substantial industries, including the manufacture of fertilizer, as a place for

going on and off duty. The employees so designated and required to travel to and from Money Point filed claims for time compensation in traveling and reimbursement for expenses. These claims were handled "on the property" and finally denied by the President of the carrier line. The claims were *not* taken to the National Railroad Adjustment Board, First Division, and the Money Point reporting station was thereafter abolished the following year.

The so-called Berkley yard is the hub of the wheel. Trains going to Sewells Point and Port Norfolk pass through the Berkley yard but thereafter travel in divergent directions. As the carrier has heretofore used steam locomotives, it was necessary to service the same at the end of each shift or tour of duty. Steam locomotives working in and out of the Berkley yard were returned to Port Norfolk for such servicing. For these reasons, the crew members operating trains in and out of the Berkley yard reported on and off duty at Port Norfolk, and rode on company time between the respective points on the locomotive which, on many occasions, traveled "light."

During the latter part of 1955 and early 1956, the carrier concluded to use Diesel locomotives in substitution for steam. The economy of the new operation is not seriously contested but, by reason of this change, it would no longer be necessary to return the locomotives from the Berkley Yard to Port Norfolk for servicing. To accommodate its crews the carrier erected, at the Berkley yard, a new building equipped with lockers, shower baths, toilets, etc. It also provided sufficient parking space for the employees who desired to travel to and from work by private automobiles.

It should be noted that, for many years, the carrier has provided free transportation on carrier's time from

Port Norfolk to the Ford Plant, to Money Point, and, in isolated instances, to the Berkley yard; such transportation being generally by station wagon owned by the carrier. As to the Ford Plant, this became necessary by reason of the Plant's activities requiring the immediate removal of an assembled automobile so as not to impede the output. To cause a break in time for a locomotive to go from the Ford Plant to Port Norfolk for the purpose of picking up a new crew, and thereafter return to the Ford Plant, would seriously disrupt plant operations. With reference to Money Point, the necessity for this practice arises only during the seasonal months when the fertilizer plants concentrated in that area are operating at full capacity. Transportation by station wagon to and from the Berkley yard is occasioned by emergencies, including the breakdown of a locomotive. The Court does not lend too much emphasis on the practices mentioned in this paragraph.

Having heard rumors to the effect that a change in the reporting and relief points was contemplated, the respective Chairmen of the Brotherhoods addressed a letter to the President of the Belt Line, dated November 25, 1955, and referred to under paragraph 11(a) of the answer, said letter having been introduced in evidence by stipulation of counsel. Stating the employees' position, it is said:

> "It is the employees position that through many years of custom, practice and acquiescence, Port Norfolk and Sewells Point have become firmly established as the two points where Norfolk & Portsmouth Belt Line crews can be required to report for and be relieved from duty. The employees of the Norfolk and Portsmouth Belt Line have established themselves in neighborhoods convenient to these established places of reporting and relief and it would be manifestly unfair for the company to deprive them of the benefits of such an arrangement by arbitrarily creating an

additional reporting and relief point for yard crews at Berkley yard.

"It is the employees further position that any change in the present arrangement where yard crews report and are relieved at Port Norfolk or Sewells Point will have to be made either by mutual consent or in accordance with the provisions of the Railway Labor Act, as amended."

Undoubtedly the wording of this letter created some feeling between the carrier and the representatives. It is certainly the prerogative of management to change the designated reporting points, but it is equally the prerogative of the employees to insist upon negotiation in matters involving "conditions of employment" and, in the event negotiations fail, the right to strike remains inviolate.

There are approximately twenty-five to thirty men who have heretofore been reporting at Port Norfolk and who, since the granting of the temporary injunction, are reporting and being relieved at the Berkley yard contrary to their wishes. Additionally, the evidence discloses that all employees within the units represented are now reporting as directed by the carrier, all of which is under protest as the employees would have gone out on strike but for the injunction. Included among the estimated twenty-five to thirty men previously reporting at Port Norfolk are eight men living in Norfolk, and undoubtedly it is far more convenient and less expensive for these men to report and be relieved at the Berkley yard. Furthermore, there are eight men living in Port Norfolk who have heretofore been regularly reporting at Sewells Point. As to these men, if their seniority permits them to secure the new jobs created in the Berkley yard, it is certainly more convenient and less expensive for them to report to the Berkley yard. It appears, therefore, that there are approximately nine to

fourteen employees (depending upon seasonal variations) who may be directly and adversely affected by the change to the Berkley yard.

By public conveyance the average time required for travel from Port Norfolk to Berkley, via toll tunnel, is one hour and ten minutes, with an expense of 42¢ each way. In the majority of instances, however, men use private automobiles.

The shortest route in time and distance, by private automobile, from the Port Norfolk yard office to the Berkley yard office, is through the toll tunnel involving an expense of 30¢ per trip for car and driver, plus 5¢ for each passenger, and a distance of 4½ miles each way. Via the toll bridge, known as the Jordan Bridge, the distance is approximately six miles, and the toll is 35¢ per round trip for car and driver, plus 5¢ each way for each additional passenger. The third alternative route is toll free but this requires an estimated 12 miles of travel one way. There are no tolls between Sewells Point and Berkley and any employees heretofore living in Norfolk and reporting at Port Norfolk would save a toll charge and approximately three miles of travel by reporting to the Berkley yard. Despite these apparent advantages to many of the employees, the answer to the ultimate question does not lie within the scope of such benefits.

The carrier did not immediately respond to the letter of November 25, 1955, due to the fact that its plans had not fully materialized. On February 9, 1956, the President of carrier requested a meeting in his office on the following day. The representatives attended this meeting at which time a letter, dated February 10, 1956, was delivered to them, signed by the President. In part, the letter states:

"It should be distinctly understood, however, that this conference is not to be construed as being held for the purpose of negotiations in connection with the matter under consideration and will be held without prejudice regarding the positions of all concerned.

"No formal notice of any changes in the company's plans has been given to any organization representing its employees since such change in plans will depend on operating conditions and will be made in accordance with the provision of the current agreements with the various organizations representing this company's employees. Therefore, no formal notice of any proposed changes in the company's program of operations is required."

After making reference to the various provisions of the several agreements relating to "point for beginning and ending day," the letter continues:

"From the above, it will be noted that the point for going on and off duty will be governed by local conditions and that this point is not fixed as to specific location and does not necessarily have to remain the same for any specified period of time. It is, therefore, subject to change by the management of this company and is governed by local conditions which is determined by operating requirements at the management's discretion in accordance with the article referred to above."

* * *

"In view of the articles referred to above, there is no restriction placed on this company which prevents it from establishing additional reporting and relief points for its crews, nor is there any requirement that if these points are established this must be done by either mutual consent or in accordance with the Railway Labor Act, as amended."

In essence, the provisions in the Schedule of Rates, Rules, and Regulations, effective December 1, 1941, are

the same with each class of employees involved herein. An example is here quoted as to Conductors and Brakemen under Article VI:

> "(a) Yard crews shall have a designated point for going on duty and a designated point for going off duty.
>
> "(b) The point for going on and off duty will be governed by local conditions. In certain localities instructions will provide that yardmen will report at the hump, others report at yard office, others at engine houses or ready tracks. It is not considered that the place to report will be confined to any definite number of feet, but the designation will be to indicate a definite and recognized location."

At the conference of February 10 the President stated that he would not entertain any conference for the purpose of negotiating changes in working conditions, all of which is apparent from the tenor of his letter. No further "on the property" conferences transpired at that time. The Brotherhoods endeavored to secure the services of the National Mediation Board but, by letter dated March 5, 1956, the Board declined to docket the application at that time. Thereafter, on April 26, 1956, the carrier notified its employees by appropriate bulletins and advertisements that the contemplated change would be effective on May 2, 1956, and that commencing that day six of its thirty-four crews would be required to go on and off duty at the Berkley yard. The carrier invited bids on the new assignments in accordance with seniority rules.

The Brotherhoods forthwith called a general work stoppage effective May 2, 1956. Its representatives notified the National Mediation Board, which body, acting under Sec. 5, First (b) of the Railway Labor Act, 45 U. S. C. Sec. 155, First (b), proffered its services. The parties

thereupon agreed to allow all matters to remain in *statu quo* pending efforts to the Board to settle the controversy. Two mediators successively visited Norfolk and discussed the matter with the parties but without success. While the Court excluded the details of any "on property" conferences, as well as details of negotiations thereafter in Washington, it is abundantly clear that the general subject of discussion was the travel time and expense involved by reason of the proposed change. Whatever may have been the original intent of the Brotherhoods to insist that the change in reporting place could not be effected without their consent, this contention, if ever proposed, was quickly abandoned. The right to make the change is conceded, but the Brotherhoods insist upon the right to negotiate with respect to any hardships created by such a change and, in view of the ultimate failure of negotiations, exercised its power to call a strike.

Subsequent negotiations before the National Mediation Board at Washington, D. C., similarly resulted in a failure of any agreement. A Mediation Agreement and Proposal was suggested by the Board, agreed to by the Brotherhoods, but rejected by the carrier; all of which was clearly within the carrier's prerogative. The Board, by letter dated July 30, 1956, made reference to other alternative procedures, including the availability of the National Railroad Adjustment Board or the creation, by agreement, of a special or system board of adjustment under the provisions of Sec. 3, Second, of the Railroad Labor Act. The carrier responded to this letter stating its position that the disagreement was a matter properly referable to the National Railroad Adjustment Board, First Division. Indeed, the carrier now insists that the National Railroad Adjustment Board must consider and act upon the matter before the Brotherhoods may exer-

cise the right to strike. Upon receiving the carrier's letter as summarized above, the Mediation Board, by telegram dated August 16, 1956, terminated its mediation efforts and closed its file, after having first been advised by the Brotherhoods that they were not agreeable to referring the dispute to the National Railroad Adjustment Board, or to a special board of adjustment. The Brotherhoods insist that the issue involved is one for negotiation, and, when negotiations fail, the right to strike exists.

The record does not indicate that either party offered to arbitrate the matter under 45 U. S. C. Sec. 157 and 45 U. S. C. Sec. 155, Third.

After waiting a period of thirty (30) days, the carrier posted a notice on September 21, 1956, to be effective at 7:00 A. M. on September 26, 1956, that the Port Norfolk reporting station would be abolished, and inviting bids for the new jobs at the Berkley yard. Three (3) days later the Brotherhoods notified the carrier that a strike had been called effective 7:00 A. M. on September 26, 1956. The state court injunction was then granted to the carrier.

The wording of the agreements between the carrier and the Brotherhoods is substantially identical to many other similar agreements which have been the subject of labor disputes of this nature. It is significant that, in the vast majority of cases considered by the National Railroad Adjustment Board, First Division, carriers have insisted that the matter now in controversy is classified under the heading of rules, rates of pay or working conditions, and that the National Railroad Adjustment Board is without jurisdiction. While the Adjustment Board has universally stated that it has jurisdiction over the dispute, the claims have been disposed of by a terse statement similar to the following:

"This dispute comes before the Division on the question of the reasonableness of designated point for going on and off duty, the determination of which is a matter of negotiation and the Division so holds."

For reference to the foregoing, see:

1. Award No. 10603, Docket No. 15422 (5/22/45).
2. Award No. 12035, Docket No. 15683 (3/23/48).
3. Award No. 14941, Docket No. 23829 (11/15/51).

In the instant case the carrier not only insists that the Adjustment Board has jurisdiction, but also contends that the individual employees must report at and be relieved from duty at the Berkley yard against their will and thereafter file and process their claims "on the property" and then through the Adjustment Board as a condition precedent to going out on strike. Counsel stated in oral argument that the time required for processing such matters may be as much as four to five years due to the condition of the docket of the National Railroad Railroad Adjustment Board, First Division. It would certainly be futile to proceed in such a manner and then be met with a brief statement to the effect that the matter was *one for negotiation*. Furthermore, the employees had filed no claims at the time of the issuance of the injunction and presumedly have filed none since that date. While the carrier had not submitted the matter in controversy to the Adjustment Board as of the date of the injunction, the Court has been verbally advised that, since the time of argument, the carrier has presented something to this Board, the details of which are not material to a determination of the carrier's right to an injunction.

As heretofore noted the carrier has established a practice, custom and usage of reporting on and off duty at the Port Norfolk yard. It has provided transportation on carrier's time and expense via steam locomotive. Conceding

that the carrier had an absolute right to designate the Berkley yard as a reporting and relief point, does this not constitute a change in working conditions which is the proper subject of negotiation? That the parties did negotiate as to the alleged hardships arising by reason of the contemplated change can hardly be questioned. If the controversy is one which is truly the subject of negotiation, it may, of course, be settled only by a voluntary agreement between the parties. Management's inherent right to designate a change of locality for reporting and relief does not, in and of itself, exclude labor's right to demand that hardships arising therefrom be negotiated and, in the event of failure along these lines, to call for a work stoppage. Courts are not empowered to force the parties to enter into contractual agreements.

Under the provisions of Sec. 2, Seventh, of the Railway Labor Act, 45 U. S. C. Sec. 152, Seventh, it is said:

> "No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreement except in the manner prescribed in such agreements or in Sec. 6 (45 U. S. C. Sec. 156) of this Act."

In the same section under "Tenth," it is provided:

> "That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent."

When we turn to Sec. 6 (45 U. S. C. Sec. 156), we find:

> "Carriers and representatives of the employees shall give at least thirty days' written notice of an intended

change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after terminaiton of conferences without request for or proffer of the services of the Mediation Board."

Technically at least, no official notice was given of any intended change in agreements pursuant to Sec. 6. The carrier has consistently taken the position that no such notice was necessary on its part. As heretofore noted, however, the alleged hardships arising from the contemplated change involving travel time and expense were the subject of negotiation before the Mediation Board and it is apparent that a supplemental agreement covering these alleged hardships was sought by the Brotherhoods. In this respect the present controversy differs from *New York Central R. Co. v. Brotherhood of Rail. Train.*, D. C. Ohio, 140 F. Supp. 273, decided May 1, 1956, which, at first blush, would appear to be a parallel case. In *New York Central* it is not contended that any practice, usage or custom had been established by the carrier wherein transportation had been provided on carrier's time to and from the actual place of work. It is further stated that New York Central was at all times ready and willing

to discuss, negotiate, mediate or arbitrate the problems growing out of the reallocation of work of the 35 employees involved by the change of yards. *New York Central* concerns only the positive assertion by the Brotherhoods that management may not make such changes without opening the avenue to further concessions totally aside from the hardships, if any, which may arise to the employees directly involved. In the instant case we have a practice, usage and custom established by the carrier which was about to be changed, with a reluctance on carrier's part to negotiate on the problems arising therefrom. Indeed, as defendants point out, there would be no occasion to negotiate the issues of "continuous time and transportation expense" unless defendants conceded that the carrier had the inherent right to make the change.

The intent and purpose of Sec. 6 of the Act is to fix a procedure for the commencement of conferences relative to changes in the agreement. The section was not intended as a restriction of the bargaining agent or a requirement of personal notice to employees. *McMullans v. Kansas, Oklahoma & Gulf Rwy. Co.*, 10 Cir., 229 F. (2d) 50, certiorari denied, 351 U. S. 918. It can certainly be waived by the affirmative act of the parties when they have negotiated and failed to reach an agreement.

It is apparent that there is jurisdiction vested in the Adjustment Board under 45 U. S. C. Sec. 153, First (i), to consider disputes between employees and carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, conditioned that the disputes are first handled in the usual manner up to and including the carrier's chief operating officer; but, if the parties fail to adjust their differences in that manner, the disputes may be referred to the Adjustment Board by the petition of

the parties or either party. The law does not make it mandatory that such disputes concerning rates of pay, rules, or working conditions be referred to said Board.

From the foregoing it appears to this Court that the circumstances surrounding this dispute fall within the classification of a "major" dispute in law. To a limited extent it may be trivial, but it is distinguished from mere "grievances" which must go to the Adjustment Board. *Hughes Tool Co. v. National Labor Relations Board*, 5 Cir., 147 F. (2d) 69.

This brings into focus the recent apparently conflicting decisions from the Fifth Circuit in *Brotherhood of Railroad Train. v. Central of Ga. Ry. Co.*, 5 Cir., 229 F. (2d) 901, and the Seventh Circuit in *Chicago River & Indiana R. Co. v. Brotherhood of Rail. T.*, 7 Cir., 229 F. (2d) 926. Certiorari was granted by the United States Supreme Court in each of these cases on October 16, 1956. The ultimate decision by the Supreme Court may (but not necessarily so) clarify the existing confusion, but it would be improper for this Court to await same which may not be determined for many months. The issue in the cited cases turns upon the applicability of the Norris-LaGuardia Act, 29 U. S. C. Sec. 101-115; the Fifth Circuit, by a majority opinion, holding that the Act applied; with the Seventh Circuit ruling to the contrary. A portion of the Norris-LaGuardia Act provides (29 U. S. C. Sec. 108):

> "No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

In *Trainmen v. Toledo, P. & W. R. Co.*, 321 U. S. 50, 64 S. Ct. 413, 88 L. Ed. 534, Justice Rutledge delivered the unanimous opinion of the Court in holding that the Norris-LaGuardia Act required, as a prerequisite to the granting of an injunction, the exhaustion of the alternatives afforded by the Act and said:

> "It (the Act) sought to make injunction a last line of defense, available not only after other legally required methods, but after all reasonable methods as well, have been tried and found wanting.
>
> * * *
>
> "Obviously, if the view of the Court of Appeals is right, the condition requiring 'every reasonable effort to settle' the dispute becomes a dead letter in railway labor disputes, since no more would be required by its terms in that application than is called for by the first condition which demands compliance with legal obligations. Respondent, however, while apparently agreeing with the Court of Appeals that compliance with one method is sufficient, relies not only upon its negotiation, but also upon its participation in mediation. This serves it in no better stead. The section is not disjunctive as to arbitration, but conjunctive as to negotiation and mediation. The case is one, so far as both language and policy go, of one or all."

Holding in the instant case that the matters in dispute are proper subjects of negotiation, that the parties have negotiated to no avail, that further compliance with Sec. 6 of the Railway Labor Act is unnecessary in view of prior failure of negotiations, that neither party has requested arbitration, that it is not incumbent upon defendants to resort to the Adjustment Board as a condition precedent to calling a strike, and that the carrier has not exhausted its efforts to arbitrate the matter voluntarily,

the Court arrives at the conclusion that the employees were legally within their rights in calling for work stoppage effective September 26, 1956, and the injunction must be dissolved.

Counsel for defendants will prepare an order to this effect, adopting this opinion as the Court's findings of fact and conclusions of law, which, after presentation to opposing counsel for inspection, shall be submitted to the Court for entry. The order shall include provision for the dismissal of this action as to Brotherhood of Locomotive Engineers, Lodge No. 331, which defendant was dismissed by agreement of counsel at the time of oral argument. Contemporaneously with the entry of an order dissolving the injunction, the Court will entertain a motion to reinstate the same upon the filing of a notice of appeal from the order of this Court. The disastrous circumstances resulting from a strike justify such action by the Court pending a final determination of the interesting legal questions by the appellate court.

(Sgd.) Walter E. Hoffman,

United States District Judge.

Norfolk, Virginia,
January 25, 1957.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

(Decided August 23, 1957.)

HAYNSWORTH, Circuit Judge:

The carrier, Norfolk and Portsmouth Belt Line Railroad Company, sought in the Circuit Court of the City of Norfolk, and obtained, a temporary injunction against the Brotherhoods representing the members of its train crews and certain of their officers. The temporary injunction proscribed any strike or work stoppage on the lines of the carrier pursuant to a strike notice which was to have become effective on September 26, 1956, and which arose out of a controversy regarding the establishment of a new point at which five of the carrier's thirty-four train crews would be required to report for duty. Upon removal of the cause to the District Court of the United States and after a full hearing upon the merits, the District Court ordered the temporary injunction dissolved, though, by supplemental order, the execution of the Court's judgment was suspended pending this appeal by the carrier.

The carrier is a switching terminal and belt line railroad exclusively serving a large number of industries in the Norfolk area. It has interchange facilities with nine other railroads in the area and some of those other railroads are dependent upon it for interchange of their traffic with others. The carrier is engaged in interstate commerce and is subject to the Railway Labor Act. The defendants, the Brotherhoods, are the representatives of its train crews. The District Court found, and the record clearly establishes, that a work stoppage on the lines of the carrier would occasion irreparable damage to the carrier and to the public and would "substantially paralyze industry in the area involved."

The center of the carrier's lines is Berkley Yard, located in South Norfolk, Virginia. This is the largest classification yard of the company and from that yard branch lines run in several directions. One of them crosses the Southern Branch of the Elizabeth River to Portsmouth, Virginia, from which there are subordinate branches and yards, the principal yard in Portsmouth being known as Port Norfolk Yard. Another line runs from Berkley Yard northerly to terminals on the southern bank of the Eastern Branch of the Elizabeth River. Another of them runs eastwardly to a connection with the Virginian Railroad over the tracks of which, together with those of the Norfolk and Southern, the carrier has operating rights by use of which it serves industries in the City of Norfolk and by which it extends its lines all the way to Sewells Point on Hampton Roads north of the City of Norfolk. Yet another line, with subordinate branches, extends from Berkley Yard in a southerly direction a considerable distance along the Southern Branch of the Elizabeth River.

From 1897 until 1917, Port Norfolk Yard, in Portsmouth, was the sole point at which train crews reported for duty and were relieved. Facilities for servicing steam locomotives were maintained there and the maintenance and service necessities of those locomotives required that they be ordinarily returned to that yard at the end of each shift. In 1917 an additional point at which train crews reported and were relieved was established at Sewells Point. Prior to 1956, except for a short period in 1941-42, when Money Point Yard was a designated point for reporting and relief, Port Norfolk Yard and Sewells Point Yard were the only designated points at which train crews were required to report for duty or to be relieved from duty.

Prior to 1956, therefore, engine crews which were to work at Berkley Yard or out of Berkley Yard would re-

port for duty at Port Norfolk Yard in Portsmouth, to which the locomotive had been brought for servicing. There they picked up the locomotive and would proceed over the lines of the carrier to Berkley Yard or to their other points of work assignment. This travel in the carrier's locomotive after having reported in was, of course, at the carrier's expense and all members of the train crew were on a pay status from the time of reporting in.

The contracts between the carrier and the Brotherhoods, representing members of its train crews, provided that the carrier should maintain certain locker room, shower, toilet and other facilities at each point at which operating employees were required to report or be relieved. Such facilities were maintained only at Port Norfolk Yard and Sewells Point Yard. Upon occasion, it was necessary that operations be substantially continuous in the yards of the Ford Plant and in the servicing of certain fertilizer plants. Upon those occasions, and when the locomotive could operate in those areas for the duration of two full shifts without being brought in for servicing, crews were relieved at the locomotive at those places. Since none of the requisite locker room, shower or other facilities were maintained at those places, however, they could not have been designated as points for reporting and relief. Consequently, when such "footboard relief" was being practiced, the relief crew would report in at Port Norfolk Yard, and would be transported by automobile to the place where the engine was working, while the relieved crew would be returned to Port Norfolk Yard by the same conveyance. In emergency, relief of crews working locomotives at other places was similarly handled.

The record, however, disclosed that there never was any custom or practice of providing transportation of train crews on a pay status to and from areas of their residence

and any designated point for reporting and relief. On the contrary the record discloses that eight employees, residing in Portsmouth, were traveling on their own time and at their own expense all the way through South Norfolk and Norfolk to Sewells Point where they reported and were relieved. Conversely, eight other employees, residing in Norfolk or South Norfolk, were required to travel on their own time and at their own expense to Port Norfolk Yard in Portsmouth for reporting and relief.

As in substantially all of the contracts between railroads and Brotherhoods representing train crews, there was a provision in the applicable contracts here that there should be a designated point for going on duty and a designated point for going off duty. Each of the contracts further provides "the point of going on and off duty shall be governed by local conditions * * *."

Against this background, and upon the assumption that under the applicable agreements it had the right to establish additional points for reporting and relief so long as it provided the requisite facilities, the carrier in 1955 began to construct such facilities at Berkley Yard. It had decided to replace its steam locomotives with diesel locomotives. The diesel locomotives required less frequent servicing than steam locomotives so that by establishing Berkley Yard as a point for reporting and relief for certain of its crews the carrier could provide substantially continuous service in and out of Berkley Yard without the interruption which would be occasioned by having to send locomotives to Port Norfolk Yard for servicing and exchange of the crews.

The interested Brotherhoods, observing the construction of the facilities at Berkley Yard, on November 25, 1955, addressed a letter to the carrier in which they expressed their position that the carrier could not designate

Berkley Yard as a point for reporting and relief of any of the crews except with the consent of the Brotherhoods or by new agreements, requiring the assent of the Brotherhoods.

At the request of the carrier, representatives of the Brotherhoods met with the President of the carrier on February 10, 1956, at which time they were handed a letter, in which he referred to the provisions of the contracts and stated the position of the carrier that, under the applicable agreements, the designation of points for reporting and relief would be governed by local conditions in the light of operating requirements as determined in the sole discretion of management, that there was no restriction upon the carrier's right to establish additional points for reporting and relief and the exercise of that right was not dependent upon the prior consent of the Brotherhoods or the initiation by the carrier of any procedure under the Railway Labor Act. Consistent with its position that the matter, under the agreements, was subject to unilateral determination by the carrier, it declined to negotiate with the Brotherhoods.

On February 13, 1956, the Brotherhoods responded to the carrier's position with a letter in which they acknowledged the right of the carrier to move the point for reporting and relief within a locality, but denied that the carrier had the right, without their consent, to establish a point for reporting and relief in a locality in which no such designated point had previously existed. They reiterated their position that the carrier could not designate Berkley Yard as such a point without the conclusion, in advance of the change, of a new or supplemental agreement.

On the same day, the Brotherhoods sent a telegram to the Mediation Board:

"Serious situation existing on Norfolk and Portsmouth Belt Line Railroad as the result of Management arbitrarily moving terminal from Port Norfolk to Berkley a distance of approximately six miles without negotiating with committees. Request your Board take immediate jurisdiction and notify carrier to hold matter status quo pending mediation proceedings. Letter follows."

By letter dated March 5, 1956, the Mediation Board declined to docket the application for mediation after observing that the terminal had not been moved from Port Norfolk to Berkley Yard though the carrier proposes to establish a new point for reporting and relief for certain of its crews.

On April 26, 1956, the carrier posted notices that effective May 2, 1956, Berkley Yard would be the designated point for reporting and relief for six of its thirty-four crews. It invited its employees to bid upon the jobs.[1]

The Brotherhoods promptly countered by advising the Mediation Board of a strike called to commence on May 2, 1956. Because of the "labor emergency" thus created, the Mediation Board proffered its services as it was authorized to do under Section 5, First of the Act. (45 U. S. C. A. 155, First.) The carrier agreed to maintain matters in *statu quo* during the mediation proceedings which followed. Mediators conferred with the parties in Norfolk, and, subsequently, representatives of all parties were summoned to

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[1] The carrier did not have divisional seniority lists. All of its employees of the same class, at whatever point they reported for duty, were carried on the same seniority list. Under the provisions of the applicable collective bargaining agreements each employee had the right to bid upon any job within his classification and new assignments were required to be posted for such bidding. Each job was awarded to the senior bidder. If there was no bid for a particular job, the carrier had the right, and was required, to assign the employee, within that classification, with the least seniority to the open job.

Washington where they conferred with a member of the Mediation Board. As a result of the efforts of the Mediation Board a number of proposals were made both by the carrier and by the Brotherhoods to settle the controversy. None of these proposals was acceptable, however.

The Mediation Board then addressed letters dated July 30, 1956, to the parties, in which it was stated:

> "The Board directs the attention of the parties to the provisions of Section 3 of the Railway Labor Act, under which the National Railroad Adjustment Board was created with full authority to hear and decide on all disputes between carriers and employees growing out of grievances or interpretations or application of agreements concerning rates of pay, rules or working conditions.
>
> "The National Mediation Board urges the parties to this dispute to either avail themselves promptly of the adjustment machinery of the Adjustment Board or to create, by agreement, a special or system board of adjustment under the provisions of Section 3, Second of the Act, to consider and decide upon the differences between them."

In response, the carrier advised the Mediation Board that its position always had been and still was that any claims arising out of the designation of Berkley Yard as a new point for reporting and relief should be referred to the Railroad Adjustment Board. The Brotherhoods, however, advised the Mediation Board that they would not agree to refer the controversy to the Railroad Adjustment Board nor would they create by agreement a special or system board of adjustment under Section 3 of the Act. (45 U. S. C. A. § 153.) Accordingly, under date of August 16, 1956, the Mediation Board addressed telegrams to the parties advising them that its efforts to mediate the dispute had been terminated.

On September 21, 1956, over thirty days after the Mediation Board had closed its file, the carrier posted a notice that effective September 26, 1956, five of its train crews would thenceforth report for duty and be relieved at Berkley Yard. Again the Brotherhoods countered, advising the carrier that a strike had been called to commence on the morning of September 26, 1956.

By virtue of the temporary injunction the strike was postponed, but Berkley Yard became the effective point for reporting and relief for five of the train crews on September 26, 1956.

Though the record clearly establishes that at least sixteen of the employees could report to Berkley Yard more conveniently and at less expense to themselves than at their previously designated points for reporting and relief, no employee bid upon the jobs at Berkley Yard. It is clear that the Brotherhoods and its members regarded the establishment of Berkley Yard as a point for reporting and relief as an unlawful change by the carrier in working conditions and it would appear that it was for that reason that no bids were received for these jobs. In consequence the jobs at Berkley Yard were filled by the carrier's assignment of employees of lowest seniority, without regard to their residences.

Thereafter the carrier submitted the controversy to the National Railroad Adjustment Board. That proceeding is now pending.

The historic difference between "major" and "minor" disputes, as those terms have long been known and understood in railroad labor controversies, is clearly delineated in the Railway Labor Act, and different procedures are provided for their determination.

"Major disputes," encompass those differences arising out of proposals for new contracts or of changes in existing

contractual or legal obligations and relations. Since such differences cannot be composed by reference to existing agreements or obligations, but only by a new agreement, the Act provides procedural steps and machinery designed to encourage and facilitate agreement. The parties are required to negotiate (§ 2, Second, 45 U. S. C. A. 152, Second), after which either party may invoke the services of the National Mediation Board (§ 5, First, 45 U. S. C. A. 155, First). If the mediation procedures are unsuccessful, the Mediation Board must, as its "final required action," endeavor to obtain an agreement to submit the controversy to arbitration (§ 5, First, 45 U. S. C. A. 155, First) and, if the dispute is still unsettled but threatens such interference with interstate commerce as to deprive any section of the country of essential transportation services, the Mediation Board is required to notify the President, who, in his discretion, is authorized to create an emergency board to investigate and report upon the dispute (§ 10, 45 U. S. C. A. 160). As was said by Mr. Justice Rutledge, speaking for the court in *Elgin, Joliet & Eastern Railway Company v. Burley*, 325 U. S. 711, 725, 65 S. Ct. 1282, 1291, 89 L. Ed. 1886, 1895:

> "* * * Every facility for bringing about agreement is provided and pressures for mobilizing public opinion are applied. The parties are required to submit to the successive procedures designed to induce agreement. Section 5 First (b). But compulsions go only to insure that those procedures are exhausted before resort can be had to self-help. No authority is empowered to decide the dispute and no such power is intended, unless the parties themselves agree to arbitration."

"Minor disputes," on the other hand, are grievances and other differences arising out of the application or interpretation of pre-existing agreements and obligations. Since

their resolution is not dependent upon a new agreement of the parties, machinery is provided by which such disputes may be decided, if the parties themselves cannot settle their differences. Strikes, or other forms of self-help, are neither contemplated nor permissible. *Elgin, Joliet & Eastern Railway Company v. Burley*, 325 U. S. 711, 65 S. Ct. 1282, 89 L. Ed. 1886; *Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad Company*, 353 U. S. 30, 77 S. Ct. 635, 1 L. Ed. 2d 622; *Manion v. Kansas City Terminal Railway Company*, 353 U. S. 927, 77 S. Ct. 706, 1 L. Ed. 2d 722. When minor disputes arise, the Act requires direct negotiation between the parties as the first procedural step (§2, Second, 45 U. S. C. A. 152, Second). If a "labor emergency" is found to exist, the Mediation Board may proffer its services (§ 5, First 45 U. S. C. A. 155, First), but jurisdiction is conferred upon the National Railroad Adjustment Board (or, by agreement, special or system boards of adjustment) to determine the controversy. Unsettled "minor disputes" may be referred to the Adjustment Board by either party. An award, other than one of money, of the Adjustment Board is binding upon all of the parties. If there is noncompliance with an award, a suit may be maintained in an appropriate District Court where the award must be accepted as prima facie evidence of the facts and findings recited in it. (§ 3, First (i), (m), and (p), 45 U. S. C. A. 153, First (i), (m), and (p).)

The issue framed, negotiated and mediated by the parties here was a minor dispute, which, upon failure of the parties to agree, was referable to the National Railroad Adjustment Board for final determination. The Brotherhoods clearly stated their position in their letters of November 25, 1955, and February 13, 1956, that, under the existing agreements, the carrier could not establish Berk-

ley Yard as a point for reporting and relief of any of its crews except with the consent of the Brotherhoods. They were standing upon the legal position that, in the absence of a new agreement requiring their assent, the establishment of a point for reporting and relief at Berkley Yard would constitute a violation by the carrier of § 2, Seventh, and § 6 of the Act (45 U. S. C. A. 152, Seventh, 156), which, for convenience, are set forth in the margin.[2] With equal clarity, the carrier in its letter of February 10, 1956, asserted its position that its proposed action was within its managerial prerogative as established in the existing agreements, which it had the unconditional and unilateral right to exercise. The existing agreements, according to the stated position of the Brotherhoods, prohibited the action, while, in the carrier's view, they authorized it.

The learned District Judge in holding that, while the carrier had the right to designate Berkley Yard as an additional point for reporting and relief, the Brotherhoods had a concomitant right to insist upon prior negotiation and

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[2] § 2, "Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title."

§ 6, "Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

other procedures looking toward a new agreement covering what they anticipated as the resultant changes in working conditions, apparently, was of the view that the decision was one for joint determination in the first instance. That was the position of the Brotherhoods in the issue as framed, for they were insisting that a new or supplemental agreement was a precedent requisite to the effectuation of the change. It was not, however, the position of the carrier and the difference between the parties, which was the issue framed, related entirely to their contractual rights and obligations under the existing agreements.

To understand the nature of the controversy we should bear in mind the recognized distinctions between decisions of different nature and the means of effectuating them under collective bargaining agreements. The differences in the nature of the major classes of decision and the resultant differences in provisions for their resolution and effectuation are clearly pointed out in *Regulation of Collective Bargaining By the National Labor Relations Board*, by Archibald Cox and John T. Dunlop, 63 Harvard Law Review 389, 401. They are highlighted in the opinion of the Court in *NLRB v. American National Insurance Co.*, 343 U. S. 395, 72 S. Ct. 824, 96 L. Ed. 1027.

A great majority of the collective bargaining agreements, by express provision or by implication, confer upon management the right and the power to make certain decisions without prior consultation with the representatives of the employees and to effectuate them in practice without the delay inherent in extended ollective bargaining procedures. Among the decisions generally regarded as falling within this class are the type of product to be produced, the location of plants, the installation of new machinery and equipment and similar matters. All of such decisions when effectuated have a resultant effect upon

working conditions and are of interest to employees and their representatives. They are none the less regarded as being within the prerogative of management alone to decide and effectuate in the first instance. Some collective bargaining agreements place in this category of decision many other matters, and it has been held that it is not an unfair labor practice for an employer to insist upon the inclusion in a collective bargaining agreement of a "management functions" clause of very broad scope. *NLRB v. American National Insurance Co.*, 343 U. S. 395, 72 S. Ct. 824, 96 L. Ed. 1027. It has recently been held that a carrier's closure of a freight yard falls within this class of decision. *Brotherhood of Railroad Trainmen v. New York Central Railroad Company*, 6 Cir., ____ Fed. 2d ____ affirming *New York Central Railroad Company v. Brotherhood of Railroad Trainmen*, 140 F. Supp. 273.

In the issue framed in this case, it clearly was the contention of the carrier that under the existing agreements the designation of a new point for reporting and relief was within this classification. It not only clearly so stated but it insistently refused to negotiate in advance regarding the change until the intervention of the Mediation Board. If the carrier was correct in this contention, its unilateral action would not constitute a violation of § 2, Seventh, or of § 6 of the Act for the prohibitions of those sections fall short of unilateral changes made in accordance with the terms of the applicable agreements and are limited to changes in those working conditions which are embodied in the agreement. See *Williams v. Jacksonville Terminal Company*, 315 U. S. 386, 62 S. Ct. 659, 86 L. Ed. 914; *Order of Railway Conductors v. Pitney*, 326 U. S. 561, 66 S. Ct. 322, 90 L. Ed. 318.

There is a second class of decision which, under collective bargaining agreements, can be resolved only by the

joint determination of management and representatives of the employees. Included in this class of decision are those things ordinarily specifically covered in collective bargaining agreements. They include wages, hours of employment, seniority rights, grievance procedures, and similar matters.

If a matter falls within the second class of decision, under the Railway Labor Act and under the applicable agreements, the carrier can make no change without initiating negotiation by giving the notice required under Section 6 of the Act and participating in the subsequent procedures available in aid of settlement of a "major dispute." If at the conclusion of all of the required successive steps there is neither agreement between the parties upon the merits nor agreement to submit the controversy to arbitration, but only then, the carrier can effectuate the change and the Brotherhoods are free to strike.

There is yet a third major class of decision which is subject to determination solely by the representatives of the employees or the membership of those organizations, but we are not here concerned with that class of decision.

The generally recognized differences in the nature of the several classes of decision and the appropriate means of effectuating each are founded upon important considerations. The installation of new machinery, for instance, is a decision which management should be more qualified to make than the representatives of employees. The making of the decision and its effectuation, without delay, may be imperative if competitive conditions are to be met and the interest of both employer and employees are to be served in the long run. That the employees have no right to participate in the making of such decisions, or to condition their effectuation upon prior negotiation and other procedural steps looking toward new contractual rights and

obligations, does not mean that the employees and their representatives are without rights. After the effectuation of such decisions of management, the employees and their representatives are free to take such action, within the confines of existing agreements, as they may feel appropriate in the light of the changed situation.

Here then, the carrier was clearly contending that the establishment of Berkley Yard as an additional point for reporting and relief was a decision within the first category. It founded its argument upon the terms of the existing agreements and insisted that it would not negotiate with the Brotherhoods prior to the accomplishment of the change.

On the other hand, the Brotherhoods were insisting that the decision was one within the second class mentioned above, which could be effected only after resort to the appropriate collective bargaining procedures provided in aid of settlement of proposals for a new or supplemental agreement.[3]

The controversy thus was centered upon the nature of the decision. The difference was whether, under the existing agreements, it was within the exclusive power of management, acting unilaterally, to make and effectuate the change or whether effectuation of the change might be

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[3] The District Court seemed to find it material that the Brotherhoods after recording their position that the change could not be made without their assent, subsequently stated that it could be done only after the negotiation of a new agreement to take care of anticipated hardship. The difference is not substantial; however, for in either event the essence of the position of the Brotherhoods was that the decision fell within Class 2 and could not be effectuated by the carrier except by the carrier's invocation of all of the procedures provided in aid of settlement of a "major dispute," and if these did not result in an agreement upon the merits or an agreement to arbitrate, the Brotherhoods would have the right to strike, all in advance of the effectuation of the decision.

conditioned by the Brotherhoods upon negotiation and other procedures looking toward a new or supplemental agreement. Since it thus arose out of a difference of opinion as to the interpretation or application of the existing agreements, it was a "minor dispute" subject to final determination by the National Railroad Adjustment Board. Evidently for that reason, the Mediation Board refused to docket the case upon the application of the Brotherhoods, though when it later found that a labor emergency existed it proffered its services, but, in terminating its efforts, referred the parties to the jurisdiction of the Adjustment Board.

We are not concerned with the merits of that controversy. Whether the carrier was correct in its interpretation of the agreements as giving it the right to accomplish the change without prior agreement or negotiation, as the Brotherhoods in this Court apparently concede, or whether the Brotherhoods were correct in their original position that they had the right, under the agreements, to insist that the carrier take the initiative in processing a "major dispute" as a condition precedent to the change can be determined only by the Railroad Adjustment Board. Our task is only to discover the nature of the issue as framed and defined by the parties and the treatment subsequently accorded it by the parties and the Mediation Board.[4]

Since the dispute is a minor one subject to final determination by the Adjustment Board, to which it has been submitted by petition of the carrier, the threatened strike should be enjoined. *Brotherhood of Railroad Trainmen v.*

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[4] There is nothing to indicate that either party was insincere in the assertion of the conflicting interpretations of their rights and obligations. Nor was the carrier's position founded upon such insubstantial grounds as to amount to an apparent attempt to circumvent the prohibitions of § 2, Seventh, and § 6 of the Act.

Chicago River and Indiana Railroad Company, 353 U. S. 30, 77 S. Ct. 635, 1 L. Ed. 2d 622; *Manion v. Kansas City Railway Company*, 353 U. S. 927, 77 S. Ct. 706, 1 L. Ed. 2d 722.

The Brotherhoods contend, however, that, at some point in the proceedings, they changed their position. They now concede that the carrier was correct in its position on the issue framed by the letters and that it, "in the exercise of its managerial prerogative, and without regard to the wishes of the Brotherhoods, has the inherent right as management to change the designated point of reporting and relief." In the testimony, witnesses for the Brotherhoods made the same concession stating additionally, that they had not sought to negotiate, as such, the question of the right of the carrier to make the change but had sought a new "agreement to cover the hardship and expense imposed on the men by this change." They conclude that, having gone through the steps of negotiation and mediation in an effort to obtain a new agreement (a "major dispute"), they are now free to strike in aid of their demands.

This belated concession of the correctness of the legal position of the carrier, however, did not come earlier than the hearing on the merits in this case, long after all negotiation and mediation had terminated. In their answer in this case, the Brotherhoods alleged that the change to Berkley Yard as the point for reporting and relief of some of the crews "does constitute a change in working conditions within the meaning of Section 2, Article 7, of the Railway Labor Act requiring the complainant to give the defendants notice of such change pursuant to Section 6 of the Railway Labor Act, and requiring negotiations by complainant and defendants to establish working conditions applicable to such change." They further alleged that the letters of November 25, 1955, and February 13, 1956,

which framed the issue as a "minor" one, evidenced their "repeatedly announced position." Moreover, their earlier position as to the legal rights of the parties was implicit in their telegram of February 13, 1956, to the Mediation Board in which they referred to the "serious situation * * * as the result of management arbitrarily moving terminal * * *." The Mediation Board, itself, apparently so regarded it, for had it been recognized as a "major dispute" arising out of new contract proposals by the Brotherhoods, the Mediation Board would not have declined to docket the case upon the application of the Brotherhoods nor, in terminating its efforts, would it have urged the submission of the controversy to the Railroad Adjustment Board or the creation of a special board of adjustment.

The District Judge excluded evidence of the details of the proposals made by the parties during the stage of mediation, but the record contains abundant evidence that they were concerned with free transportation and travel time pay for employees, residing in Portsmouth, who would report for duty and be relieved at Berkley Yard. The subject of the proposals, however, does not define the issue or establish the nature of the dispute. If the "minor" issue, as framed, was to be negotiated and mediated, the successive proposals would not take the form of endless argument of the conflicting legal positions of the parties, but that of practical compromise. The legal differences as to the unilateral right, under the existing agreements, of the carrier to establish Berkley Yard as an additional point for reporting and relief could be finally determined only by the Railroad Adjustment Board. Any compromise necessarily would concede something to the demands of the Brotherhoods that their consent to the establishment of Berkley Yard as an additional point for reporting and relief must be purchased by payment of travel time and

free transportation to and from Port Norfolk Yard and Berkley Yard.[*]

The subject matter of the proposals during negotiation and mediation adds no support to the contention of the Brotherhoods that a new rule was proposed, negotiated and mediated. On the contrary, the refusal of the Brotherhoods to accept the change, without concessions acceptable to them, suggests firm adherence to their stated view that the carrier could not lawfully make the change without their consent, a position they reiterated in their answer in this case.

If the present concession of the Brotherhoods was manifested earlier than the hearing on the merits in this case, they would have accepted, not opposed, the proposed change in the point of reporting and relief for some 25 to 30 of the 172 employees involved, reserving the right to propose such rule changes as seemed appropriate. Indeed, their very insistence, upon a previously negotiated new rule emphasized their stated position that the controversy was one of denial of the contractual right of the carrier to effectuate the proposed change. The record conclusively establishes that the change would be very advantageous to 16 of the 25 to 30 employees involved. Since Berkley Yard is located immediately across the Southern Branch of the Elizabeth River from Portsmouth and since Port Norfolk Yard is in the northern portion of Portsmouth, it is by no means certain that Berkley Yard is less accessible to all residents of Portsmouth than is Port Norfolk Yard. The distance between the two yards by the most direct route (toll tunnel) is 4½ miles, but Berkley Yard is closer and

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[*] The demands of the Brotherhoods apparently would apply to those residents of Portsmouth who, on their own time and at their own expense had been travelling the much longer and costlier route to report at Sewells Point Yard. If operations were to be continuous at Berkley Yard, travel time pay would likely be at premium rates.

possibly more accessible to some areas of Portsmouth than is Port Norfolk Yard. Only by acceptance of the proposed change and permission of its members to freely bid on the Berkley Yard jobs in accordance with the existing agreements and seniority rules could it be determined what, if any, hardship might be imposed upon residents of Portsmouth by the change.

Under such circumstances, if the Brotherhoods had regarded their legal position to be what they now concede, they should have awaited the event, accepting the change as the admitted right of the carrier, and, after ascertaining what hardship ensued, proposed such rule changes as they felt appropriate. *Brotherhood of Railroad Trainmen v. New York Central Railroad Company*, 6 Cir., Fed. 2d (decided June 14, 1957), affirming *New York Central Railroad Company v. Brotherhood of Railroad Trainmen*, 140 F. Supp. 273.

The New York Central case is strikingly similar to the one here. There the New York Central proposed to close its North Toledo Yard. It acted upon the assumption, which the court found to be correct, that, under the existing agreements it had the absolute right to do so. That right was challenged by the Brotherhoods who took the position that the yard could not be closed until a new agreement, covering all of the anticipated problems and hardships involved in the reassignment of employees, had been concluded and that § 6 of the Act cast the burden upon the carrier to initiate negotiations looking toward such an agreement. When the controversy developed into a "labor emergency" the Mediation Board proffered its services, which were accepted, and extended efforts to mediate and compromise the controversy followed. They were not successful and the Mediation Board closed its file. The Brotherhoods gave notice of a strike, and the court issued an injunction. Up-

holding the legal right of the carrier to close the yard, the court held that anticipated hardship in the reassignment of employees was a "separate and distinct problem that may be met when the time arrives," but was not presently a labor dispute upon which a strike might lawfully be founded.

Bargaining for compensation for anticipated hardships which may never be incurred and the extent of which is unknown is difficult at best. When further complicated by the fact that the primary issue was the conflict in the legal postulates of the parties, it is not surprising that agreement could not be reached.[6] Certainly, the failure of agreement under those conditions does not suggest that, if special hardship does result from the change to Berkley Yard, appropriate agreements cannot be concluded.

If "the moral force of public opinion (is the) ultimate sanction" of the Act in the disposition of "major disputes," it is incumbent upon the parties to submit themselves to the successive procedures of the Act before resorting to self-help. *Virginian Railway Company v. System Federation*, 300 U. S. 515, 57 S. Ct. 592, 81 L. Ed. 789; *Elgin, Joliet & Eastern Railway Company v. Burley*, 325 U. S. 711, 65 S. Ct. 1282, 89 L. Ed. 1886. These procedures are

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[6] The negotiation required by the Act is the same "good faith" bargaining required by the Labor Management Relations Act. *Brotherhood of Railway Trainmen v. Toledo, Peoria & Western Railroad*, 321 U. S. 50, 64 S. Ct. 413, 88 L. Ed. 534. Under the latter act bargaining from a legally erroneous premise may be held an unfair labor practice. *Taylor Forge & Pipe Works v. NLRB*, 7 Cir., 234 Fed. 227. See also, *NLRB v. Truitt Manufacturing Co.*, 351 U. S. 149, 76 S. Ct. 753, 100 L. Ed. 1027; *NLRB v. Darlington Veneer Company*, 4 Cir., 236 F. 2d 85. It may be that, without questioning the sincerity of their conviction of their legal rights, which they apparently now concede to have been erroneous, the bargaining did not satisfy the substantive requirement of negotiation imposed upon the Brotherhoods by the Act.

ordinarily initiated by giving the notice of proposed changes in agreements required by Section 6 of the Act (45 U. S. C. A. 156). The Brotherhoods did not comply with Section 6. Nor can we say that the carrier waived the requirements of that Section when it subsequently participated in mediation, for the issue framed was a "minor" one to which Section 6 is inapplicable. Indeed it was handled as such, and all of the mandatory procedures in aid of settlement of "major disputes" have not been completed.

If by a tardy change in its legal position, a party could convert a "minor dispute" processed through the procedures applicable only to those disputes, into a "major dispute" fully processed, the mandatory provisions of the Act in aid of settlement of "major disputes" would be circumvented and the public denied those safeguards against interruptions of service, the establishment of which was the major purpose of the Act. The concession of the Brotherhoods to the legal position of the carrier upon the "minor issue" may have made moot the pending proceeding before the Adjustment Board, but it cannot leave them free to strike in aid of proposed contract changes when they have not fully processed any such proposal as a "major dispute" under the required procedures of the Act.

Since the issue framed and processed by the parties was a "minor" one, resort by the Brotherhoods to a strike was not lawful and a permanent injunction should be entered. The injunction will be without prejudice to the right of any party to process, under applicable provisions of the Act, any dispute which, properly framed, may arise out of the factual situation, or to apply to the District Court for such further orders as may be appropriate in the light of this opinion.

Reversed and Remanded.

JUDGMENT OF THE COURT OF APPEALS.

(Filed August 23, 1957.)

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of Virginia, at Norfolk, for the entry of appropriate orders in accordance with the opinion of the Court filed herein.

MORRIS A. SOPER,
United States Circuit Judge.

SIMON E. SOBELOFF,
United States Circuit Judge.

CLEMENT F. HAYNSWORTH, JR.,
United States Circuit Judge.

ORDER OVERRULING PETITION FOR REHEARING.

(Filed September 30, 1957.)

The petition for rehearing in this case has been read and considered and the Court is of the opinion it is without merit. It is therefore ordered this day of September, 1957 that the petition be and is hereby overruled.

MORRIS A. SOPER,
United States Circuit Judge.

SIMON E. SOBELOFF,
United States Circuit Judge.

CLEMENT F. HAYNSWORTH, JR.,
United States Circuit Judge.

In the Supreme Court of the United States

OCTOBER TERM, 1957.

No. 622.

BROTHERHOOD OF RAILROAD TRAINMEN, LODGE NO. 514, *et al.*,

Petitioners,

v.

NORFOLK AND PORTSMOUTH BELT LINE RAILROAD CO.,

Respondent.

PETITIONER'S REPLY BRIEF.

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Respondent.

PETITIONER'S REPLY BRIEF.

The petitioners believe that a reply to the respondent's brief is justified because the respondent seeks to bring this case within the holding in *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. R. Co.*, 353 U. S. 30, and avoid the decision in *Manion v. Kansas City Terminal Railway Co.*, 353 U. S. 927, by asserting a conclusion that is clearly *not* justified by the facts of this case. This conclusion appears on pages 8 and 9 of respondent's brief and is stated as follows:

> "They (petitioners) lose sight of the fact that the injunction granted was a temporary one, granted to preserve, for a reasonable time, the status quo, *in order that the controversy might be submitted to the Adjustment Board.*" (Emphasis ours.)

In short, the respondent seeks to convey the impression that, following the attempt of the parties to settle

their dispute by direct negotiation, a race ensued between the employees and the respondent because of the haste of the former to withdraw from their employment and the effort of the latter to submit the dispute to the National Railroad Adjustment Board before the strike could be made effective.

Does the record justify this representation? The pertinent facts are as follows.

Bargaining conferences and correspondence had been conducted over a considerable period between the respondent carrier and the representatives of its switching crews regarding the right of the carrier to change the designated place for its switching crews to report for duty and be relieved from duty. At the beginning of the dispute the parties were in disagreement over the meaning of certain rules on the subject of crews reporting for duty that are contained in the enginemen's and trainmen's collective agreements. (Appellant's App. pp. 63-71.) The efforts of the parties to reach agreement failed. The employees tried on February 13, 1956, to invoke the mediatory services of the National Mediation Board, but the Board declined to assume jurisdiction of the dispute, and on April 26, 1956, the respondent posted notice on its bulletin board that its decision to change the place where crews were to report for work would be put into effect May 2, 1956. The next day, April 27, 1956, the employees' representatives announced that the employees would strike on May 2, 1956. This announcement could not fail to have informed the respondent that the employees took a serious view of the respondent's refusal to settle the dispute and its persistence in enforcing the rules according to its own views.

The National Mediation Board thereupon entered the dispute because a "labor emergency" was found to exist,

the strike was postponed, and the parties were invited by the Board to come to Washington. Late on July 23, 1956, an agreement designed to settle the dispute was proffered to the parties by the Board. It was approved and signed by the employees' representatives on July 24. (Appellant's App. p. 23.) The respondent's president withdrew from the conference on July 24 and returned to Norfolk to consult with others on the advisability of signing the agreement. (Appellant's App. pp. 71-73.)

The next day, July 25, 1956, the respondent's president notified the Mediation Board by letter that the carrier was rejecting the "Mediation Agreement and Proposal" and thanked the Board for its efforts to bring the parties to agreement. (Appellant's App. p. 72.)

This action by the respondent ended all efforts by the parties to compromise and settle the dispute, and the respondent could not fail to know that its rejection of the proposed "Mediation Agreement" and a persistence in enforcing its own views would be followed in due time by a reannouncement of the employees' earlier decision to strike.

The Mediation Board did not formally advise the parties that it was closing its file on the dispute until three weeks later, in a telegram dated August 16, 1956. (Appellant's App. p. 29.) The situation on the property remained in statu quo for more than thirty days longer, in compliance with the requirement of Section 5, First, of the Railway Labor Act.*

On September 21, 1956, the respondent advised the employees that its decision to change the place where crews must report for work would be put into effect on September 26, 1956.

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* 45 U. S. C. Sec. 155, First.

The employees countered with a notice to the respondent on September 24, 1956, advising that the employees would strike two days later, on September 26.

On the same day that the employees notified the respondent that a strike would take place, to-wit, on September 24, the respondent was prepared with a sixteen page mimeographed complaint in which was detailed the history and the issues of this dispute. It filed the complaint in the Circuit Court of Norfolk, Virginia, and also obtained a temporary injunction against the strike before the close of that same day.

The respondent did not get around to submitting the dispute to the National Railroad Adjustment Board until December 17, 1956.

From July 25 to September 24, 1956, a period of two full months, the respondent could not fail to realize that it must anticipate a strike by its employees over this dispute. This is true because the employees had already formally declared their intention to strike if the respondent persisted in its ex parte decision to change the established place for crews to report for work. It is true for the further reason that the respondent could not fail to know that its rejection on July 25 of the Mediation Agreement would be the end of efforts by either party to resolve the dispute by peaceful negotiation. It may further be assumed that the respondent knew its own mind, which is to say, that it did not intend to abandon its decision to change the place for crews to report for duty unless its plans were forcibly interfered with.

The respondent knew on July 25, 1956, that many weeks would elapse before the necessary chain of events could transpire that would precipitate a renewal of the employees' declaration to strike. Moreover, it is fair to

say that the respondent has, in effect, admitted its awareness that the strike threat would be renewed, by the fact that on the day the employees announced their intention to strike the respondent was able to go to court equipped with an elaborate complaint detailing the history of this dispute.

It is in the light of the foregoing facts and considerations that the respondent says to this Court that it needed the temporary injunction to preserve the status quo "*in order that the controversy might be submitted to the Adjustment Board.*"

We suggest that the assertion is manifestly not true.

The respondent, at the time it obtained the temporary injunction from the Circuit Court of the City of Norfolk on September 24, 1956, had already had two months to prepare its submission to the Adjustment Board. During that period it chose, rather, to prepare its complaint for injunction, which was in form for filing on the day the employees announced their intention to strike. Patently, if equivalent energy had been devoted to the preparation and filing of a submission to the Adjustment Board, the pendency of the dispute before the Board could have been established prior to the strike date and the factual situation in the instant case would have come within the purview of the *Chicago River and Indiana* decision.

As a matter of uncontroverted fact, at the time the strike was called—September 24, 1956—respondent railroad had neither filed a submission with the adjustment Board nor indicated an intention so to do. The Mediation Board had closed its file on August 16, 1956. By law, the statutory restraint on the right of the employees to strike ended thirty days thereafter. Respondent permitted the right to strike to mature and a strike to be called on Sep-

tember 24 without having made a submission to the Board, despite its having had two months' interval to prepare this step.

Petitioners submit that under these circumstances the right to strike, which would have been exercised on September 26, 1956, but for the injunction, could not be obliterated by a subsequent submission to the Adjustment Board, as now contended by respondents and decided by the Court of Appeals.

The Questions Presented in the Petition For Writ of Certiorari Are Based Upon a Ruling Initially Made by the Court of Appeals and Challenged by the Petitioners at the First Seasonable Opportunity.

The trial of this case took place on October 9 and 10, 1956. The first and principal issue posed for decision by this trial concerned the character of the dispute in which the parties were involved—whether it should be classified as a "major dispute" or a "minor dispute." The respondent's position when before the District Court was that the dispute must be classified as a "minor dispute" and such dispute cannot be the subject of a lawful strike because the Railway Labor Act requires employees to submit such disputes to the National Railroad Adjustment Board.

The petitioners took the position that the dispute must be classified as a "major dispute," and hence there could not be the slightest doubt that a strike based upon a dispute of this character would be a lawful strike under the Railway Labor Act. The District Court sustained the position contended for by the petitioners, and the action was thereby resolved without reaching the issue of law involved in the *Manion* case.

The 90-day temporary injunction that was issued by the Circuit Court of the City of Norfolk was due to expire on or about December 24, 1956, and respondent's counsel appeared before the United States District Court to obtain an extension of the injunction. On this same occasion the respondent's counsel moved the court to allow respondent to supplement the trial record with evidence showing that the dispute had been submitted by the respondent to the Adjustment Board. The District Court refused the proffer on the ground that the record was completed and closed. The District Court also stated in its decision on the merits that the fact that some form of submission to the Adjustment Board had been made by the respondent was irrelevant, in view of the disposition of the case made by the Court's decision.

When the Court of Appeals for the Fourth Circuit reached its decision holding that the District Court erred in deciding that the dispute must be classified as a "major dispute," the question whether the Railway Labor Act deprives employees of the right to strike over "minor disputes" became for the first time in this litigation a pertinent question for the court to consider. The decision by the Court of Appeals to the effect that the proposed strike set for September 26, 1956, would have been an unlawful strike because a strike based upon a "minor dispute" is forbidden by the Railway Labor Act, made opportune for the first time a challenge by the petitioners to this proposition of law. And the challenge was asserted promptly in a petition for rehearing filed by the petitioners with the Court of Appeals.

The respondent opposes the granting of the writ of certiorari on the ground that this Court will not decide an issue that was not submitted to the District Court, save

in unusual circumstances. The rule referred to is a proper rule when applied in the proper circumstances. But the petitioners believe that the rule is not properly applicable to the instant case because of the procedural circumstances described above.

The decision by this Court in *Friend v. Talcott*, 228 U. S. 28, has been cited many times as authority to disprove that the rule referred to by the respondent is a hard and fast rule, save for those instances when the importance of the case creates the unusual circumstances that justify an exception to the rule. The pertinent statement from the decision in the *Talcott* case is as follows: *

> "There is a contention that the questions of waiver and election, although passed on by the court below, are not open for our consideration because it is asserted they were not raised in or considered by the trial court. As we think the contention is without merit, we proceed to dispose of the propositions concerning election and waiver and *res judicata*."

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* The *Talcott* case reached this Court by the issuance of a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit.

The following cases contain decisions supporting the petitioners' contention that the questions presented by their petition for a writ of certiorari involve an issue that has been adequately raised and considered in the Court below:

Consolidated Turnpike Co. v. Norfolk and Ocean View Ry., 228 U. S. 326, at 334;

Cumberland Coal Co. v. Board of Revision, etc., 284 U. S. 23, at 24;

Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U. S. 358, at 366.

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December 24, 1957.

SUPREME COURT, U.S.
FILED
DEC 23 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 622

BROTHERHOOD OF RAILROAD TRAINMEN, LODGE No. 514, ET AL.,

Petitioners

v.

NORFOLK AND PORTSMOUTH BELT LINE RAILROAD COMPANY,

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Norfolk and Portsmouth Belt Line Railroad Company, hereinafter designated as respondent, respectfully submits that certiorari should be denied for the following reasons:

1. The petition shows no facts indicating that this Court should exercise its discretion in a manner favorable to the petitioners.

2. The question raised by the petition for certiorari was not raised in the pleadings, was not raised in the District Court, and was not raised in the United States

Court of Appeals for the Fourth Circuit until after that Court had rendered its opinion reversing the District Court, and holding that the respondent is entitled to the injunction. Thereafter petitioner filed in that Court a petition for a rehearing, in which the same question was raised. The rehearing was denied.

3. Nothing whatever will be accomplished by granting certiorari, even if the decision of the United States Court of Appeals for the Fourth Circuit is reversed.

FACTS

The United States Court of Appeals for the Fourth Circuit, in its opinion, quoted verbatim in petitioners' appendix, set forth clearly and accurately the essential facts; but respondent believes that the facts, as there stated, should be supplemented as follows:

First, it desires to quote Section 42 of the complaint as amended, which reads as follows:

> "42 (Amended). Before claims can be submitted to the National Railroad Adjustment Board they must be handled on the property in the usual manner up to and including the highest operating officer of the carrier designated to handle claims, in this case the President of complainant. The complainant has negotiated with defendants concerning its proposed changes under the jurisdiction of and with the help of the National Mediation Board, and the parties have never reached an agreement. The defendants have not made any claim or alleged any grievance in connection with or arising out of the proposed change in operations. Therefore, there has been no opportunity to handle any claim or grievance. In spite of the differences of opinion, the complainant hoped and believed that when the changes were announced that

the defendants would comply therewith. Until they refused to comply, it had no grievance or complaint and, therefore, nothing to submit to the National Railroad Adjustment Board. The notice from the defendants of their intention to strike, which was received on the afternoon of September 24, 1956, is the first affirmative notice it has received and the defendants would not comply with its orders. In the time which will intervene between the receipt of the notice and the effective date and hour of the strike it is impossible to submit the controversy to the National Railroad Adjustment Board. The complainant intends to submit the matter to said Board at the earliest possible date. It avers that the work stoppage or strike should be enjoined or restrained in order to keep the railroad in operation pending a final determination of such matters, in accordance with the orderly processes of the Railway Labor Act."

Second, it calls attention to the fact that the time which would have elapsed between the receipt of the strike notice in the afternoon of September 24, 1956, and the effective date of the proposed strike was less than 48 hours, in which time it would have been impossible to submit the controversy to the First Division of the National Railroad Adjustment Board.

In its complaint the respondent asked only for a temporary injunction at the time the suit was filed, coupled with an application for a permanent injunction to be granted after a full and complete hearing.

The only injunction granted up to this time is the temporary injunction.

The permanent injunction is yet to be granted, as a result of the opinion of the United States Court of Appeals for the Fourth Circuit.

ARGUMENT

1. THE PETITION SHOWS NO FACTS JUSTIFYING CERTIORARI.

Granting or denying certiorari is a matter within the sound judicial discretion of the Court, and such discretion will be exercised in granting certiorari only where there are special and important reasons therefor. (Rule 19). The same rule, while not purporting to be all inclusive, indicates the character of reasons which are to be considered.

If there are any facts constituting "special and important reasons" they should be set forth in the petition for certiorari. None is set forth in this petition.

2. THE QUESTION INVOLVED WAS NOT RAISED IN THE DISTRICT COURT OR THE UNITED STATES COURT OF APPEALS.

It is axiomatic that appellate courts will not decide questions not submitted to the trial court, save in very unusual circumstances. There are no unusual circumstances in this case.

Virtue v. *Creamery Package Co.* (1913) 227 U. S. 8 was an action under the Sherman Act. The facts are in nowise analogous to the case at bar, but a portion of the opinion of this Court is applicable. We quote from pages 38 and 39 of the opinion:

> "But plaintiffs urge that the Creamery Package Manufacturing Company was of itself a combination offensive to the statute and that they were entitled to go to the jury as to that company. But the contention was not made in the Circuit Court nor was it made in the Circuit Court of Appeals. The case was tried and ruled upon, as we have seen, on the ground

of the cooperation of the defendants in a scheme of monopoly and restraint of trade. * * *. It is manifest, therefore, that the separate liability of the Creamery Package Manufacturing Company is an afterthought and urged in this court for the first time."

This Court refused to consider that point.

A similar question was considered by the United States Court of Appeals for the Seventh Circuit in 1955, in a patent case, *Hazeltine Research Co.* v. *Avco Mfg. Corp.*, 227 Fed. (2) 137, 139. The Court in its opinion stated that the first reason advanced by Avco to sustain its contention that the reissue claims in issue were invalid, is that they were granted through "factual technical error." The Court further stated that Avco cited certain evidence in the record which it claimed showed that an amendment to the claims made the claims factually incorrect.

Evidently the plaintiff objected to consideration of that point by the Court of Appeals, and in connection therewith, the Court of Appeals said:

> "We agree with plaintiff that this contention is not properly before us for determination. Avco's answer and counterclaim make no specific reference thereto, nor is there anything in the record to indicate that this issue was presented to the district court. While Avco in its reply brief states that the issue was covered in its proposed findings of fact and conclusions of law, no submitted finding or conclusion specifying that issue has been included in the record before us. Avco in its brief states that the district judge made no specific findings on this issue. We are not surprised at that statement in view of the total failure of the record before us to show that that issue was ever raised in that court. Therefore, we cannot consider it here." (P. 139).

Certiorari was denied. 350 U. S. 987, 76 S. Ct. 474, 100 L. Ed. 854.

An examination of the record shows that although respondent, in paragraph 42 of its complaint as amended, stated that there had been no submission to the Adjustment Board because of lack of time, and stated further, an intention to submit the matter to said Board, petitioners in their answer did not raise the question now presented, and the District Court did not mention that fact in its opinion.

However, the District Court did mention the fact that the matter had been submitted to the Adjustment Board, although the District Judge did not consider the matter of any importance. The applicable language taken from the opinion is:

> "* * *. While the carrier had not submitted the matter in controversy to the Adjustment Board as of the date of the injunction, the Court has been verbally advised that, since the time of argument, the carrier has presented something to this Board, the details of which are not material to a determination of the carrier's right to an injunction." (Respondent's brief, Appendix I, p. 53).

Reference to respondent's brief filed in the United States Court of Appeals for the Fourth Circuit, page 10, et seq., will show that respondent specifically and emphatically relied on the fact that the controversy had been submitted to the Adjustment Board and was then pending before it.

While respondent relied on many other points, the brief shows that one of its main reliances was on that fact, especially in view of the decision of this Court in *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana*

R. R. Co., 353 U. S. 30, 77 S. Ct. 635, 1 L. Ed. (2) 622, and *Marion* v. *Kansas City Terminal Rwy. Co.*, 353 U. S. 927, 77 S. Ct. 706, 1 L. Ed. (2) 722.

In *Chicago River*, this Court, in the first paragraph of its opinion, stated:

> "* * *. The ultimate question is whether a railway labor organization can resort to a strike over matters pending before the Adjustment Board."

After making that statement, it decided that a strike in such circumstances was illegal.

In *Marion*, this Court, in a single paragraph, vacated an injunction granted by a Missouri Court "because the dispute here is not pending before the National Railroad Adjustment Board. * * *."

In these circumstances, respondent considered it of the utmost importance to convince the United States Court of Appeals that the matter was pending before the Adjustment Board and that it was entitled to an injunction for that reason alone.

In spite of all this, petitioners ignored that point completely. It is not mentioned in their brief and was not mentioned in the oral argument of the case on the merits.

The United States Court of Appeals considered that fact to be of some moment and, in its opinion, stated:

> "Thereafter the carrier submitted the controversy to the National Railroad Adjustment Board. That proceeding is now pending." (Appendix 25a).

Petitioners relied entirely on other grounds; three in number, as follows:

1. "The dispute between the parties is negotiable." (Petitioners brief, p. 8).

2. "This dispute does not involve the interpretation of a contract or rule so as to be within the jurisdiction of the National Railroad Adjustment Board." (Petitioners brief, p. 20).

3. "The appellees, having complied with the procedural requirements of the Railway Labor Act, had the right to strike when enjoined by the State Court." (Petitioners brief, p. 29).

Petitioners were content to ignore respondent's contention and to take their chances on securing a favorable decision from the United States Court of Appeals on the grounds mentioned.

After that Court rendered its opinion, petitioners filed a petition for a rehearing, based solely on the same question here presented, and that was the first and only time such a question had been raised.

3. NOTHING WHATEVER WILL BE ACCOMPLISHED BY GRANTING CERTIORARI, EVEN IF THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IS REVERSED.

Petitioners argue that the injunction was illegal when granted, solely because the matter was not then pending before the Adjustment Board, and having been illegally granted, it can never become legal. Stated differently, they argue that even though the matter is now before the Adjustment Board, the strike cannot be enjoined.

They lose sight of the fact that the injunction granted was a temporary one, granted to preserve, for a reason-

able time, the status quo, in order that the controversy might be submitted to the Adjustment Board. In their petition for a rehearing in the United States Court of Appeals (p. 5, et seq.) they called attention to the fact that in *Manion* this Court authorized the reinstatement of the injunction if the question were *thereafter* submitted to the Adjustment Board. They approved of that action by this Court. The following paragraph is quoted from page 6 of their petition:

> "*This was an altogether reasonable and proper disposition in view of the fact that the National Mediation Board had not had an opportunity before the injunction was issued to exert its influence to persuade the parties to settle their grievances,* and the further fact that preparing an accumulation of one thousand disputes for submission to the Adjustment Board is a task requiring time. *Hence, the Supreme Court preserved for a 'reasonable time,' the status quo in order that the carrier might have the opportunity to invoke the jurisdiction of the Adjustment Board with the same results that attended the submission of the disputes* to the Adjustment Board in the *Chicago River* case, to-wit, for forfeiture on the part of the employees of their right to withdraw from service." (Italics added)

If we assume for the sake of argument that this Court should grant certiorari and should reverse the decision of the Court of Appeals solely on the ground that the matter was not pending before the Adjustment Board when the temporary injunction was granted, what will the result be?

The matter is now pending before the Adjustment Board and it unquestionably has sole and exclusive jurisdiction to interpret the rule or contract. There is nothing to prevent respondent from starting a new suit and ask-

ing for an injunction at this time to prohibit the strike, upon the ground that the controversy is pending before said Board.

In view of this Court's ruling in *Chicago River*, supra, such an injunction will certainly be granted.

Without bringing a new suit, when the case is remanded, respondent can file an amended and supplemental complaint making the same allegation and with the same result. *Texarkana* v. *Arkansas Gas Co.*, 306 U. S. 188, 203, and *Manion*, supra.

In *Texarkana*, the Court had occasion to deal with a situation involving a change of circumstances since the initiation of the suit. In fact, the change in that case came *after* the decision in the District Court. The right which enured to the appellant by reason of such change in circumstances had not come into effect when the supplemental petition had been filed. This Court held that the petition was premature as to so much of the relief as was based on the changed circumstances. It said:

> "*The present action is an appropriate proceeding for the settlement of the entire rate controversy and the refund of such sums as may be determined, ultimately, to be due the Texas consumers.* **Where there is a good cause of action stated in the original bill, a supplemental bill setting up facts subsequently occurring which justify other or further relief is proper.** *If the original decree in the trial court had not been entered, this supplemental petition would simplify the controversy. We think this procedure is equally applicable after remand for further proceedings.*" (Italics supplied).

In *Manion*, supra, the Supreme Court was even more specific.

Having vacated the judgment of the Court below in the first sentence of its opinion, it said in the second and final sentence thereof:

> "* * *. *The cause is remanded for further proceedings not inconsistent with this decision and without prejudice to the power of the Court of Appeals to reinstate its judgment if the dispute is submitted to the Adjustment Board by either party within a reasonable time.*" (Italics supplied).

Respondent's position in this respect is even stronger than the carrier in *Manion*.

In *Manion* the case had not been submitted to the Adjustment Board up to the time the petition for certiorari was filed in this Court.

In the case at bar it had been submitted to the Adjustment Board before the District Court rendered its opinion and respondent relied on it throughout.

The only possible defect in respondent's case is that the fact of submission to the Adjustment Board was not alleged in the complaint.

In remanding *Manion*, all that this Court required as a condition precedent to reinstatement of the injunction was that the controversy be submitted to the Adjustment Board within a reasonable time. It did not require any amendment of the pleadings.

CONCLUSION

Respondent respectfully submits that certiorari should be denied.

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